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Supreme Court of the United States

OCTOBER TERM 1949

No. .....

ANHEUSER-BUSCH, INCORPORATED,
Petitioner,

against

DU BOIS BREWING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I

Statement of the Matter Involved

Petitioner, Anheuser-Busch, Incorporated, brought suit in the District Court of the United States for the Western District of Pennsylvania against Du Bois Brewing Company for infringement of trade-mark rights and unfair competition.

The decree of the District Court permanently enjoined the defendant, respondent here, from using the word "Budweiser" or the word "Bud" or any word confusingly similar to these, in connection with beer or any similar or related product not petitioner's, and from otherwise competing unfairly with petitioner (R. 941a).

The Court of Appeals for the Third Circuit reversed this decree, O'Connell, C. J., with whom McLaughlin, C. J., joined, writing the majority opinion, which is the decision

that petitioner now asks this Court to review (R. 5317-5328). Goodrich, C. J., dissented with opinion (R. 5328-5331).

1. Summary of the basic facts

Since 1876 petitioner and its predecessors have used the word "Budweiser" as a brand name for beer (R. 5318). Sales, advertising and distribution have been on an ever-increasing scale, except that during Prohibition (1919-1933), sales and advertising were limited to malt syrup, yeast and near-beer (R. 5319). In 1905 the sales amounted to the equivalent of 444,265 barrels and in 1945 to the equivalent of more than 3,000,000 barrels (R. 5318-5319).

Petitioner's predecessor's trade-mark rights were adjudicated in their favor in two suits prior to 1905.[1]

The District Court made the following findings which were not set aside by the Court of Appeals:

> "Long prior to June, 1905, the word 'Budweiser' had acquired a secondary meaning indicating the output of plaintiff's predecessor exclusively and the trade and public generally had come to use the word 'Budweiser' and its abbreviation 'Bud' to designate the beer of plaintiff's predecessor and of no one else" (R. 921a).
>
> "Irrespective of its character as a technical trade-mark, the word 'Budweiser' since long prior to 1905 has been and now is the trade-mark of the plaintiff by virtue of its association with the plaintiff and plaintiff's predecessors, and with the products of the plaintiff, whereby the word 'Budweiser' has become generally known throughout the United States to the trade and consumers as meaning the product of the plaintiff and of none other" (R. 931a).

In June, 1905, respondent, "owner of a brewery which (until 1945) never has sold more than 90,000 barrels of beer annually, began selling *some of its beer* under the

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[1] *Conrad* v. *Uhrig*, 8 Mo. App. 277 (St. Louis Ct. of App.—1880); *Anheuser-Busch Brewing Assn.* v. *Fred Miller*, 87 F. 864 (E. D. Wis.—1898).

name 'Du Bois Budweiser' "[1] (R. 5319). (Language of the Court of Appeals majority opinion; italics ours.)

The majority opinion of the Court of Appeals states:

> "The record amply supports the finding of the court below, however, that Du Bois began marketing 'Du Bois Budweiser' with full knowledge of the extensive use of the word 'Budweiser' by the Association" (R. 5319).

Respondent's sales of some of its beer as "Du Bois Budweiser" continued (except as interrupted by the fifteen years of Prohibition) up to the time this suit was brought, in April, 1940. The beer that respondent sold under the name "Du Bois Budweiser" was sold both in bottles and in barrels. The bottles bore labels reading "Du Bois Budweiser" (R. 5329, 5330, 1395a). The beer sold in barrels was dispensed from bars in taverns out of a beer tap with a handle bearing the words "Du Bois Budweiser" (R. 5330; Pet. Du Bois Ex. 96, T. 12163; Ex. 132, T. 2054).[2] Respondent's sales during the period from 1905 to Prohibition (1918) and during the period since Prohibition (1933), according to the evidence adduced by the respondent, extended only to a limited territory, but as to particular places and areas were scattered and sporadic and without consistent continuity, and proof of the amounts sold in particular places since Prohibition was wholly lacking (Resp. Exs. G, H, 7F's and 7G's, R. 5390-5421; T. 2078; T. 2081, 2979, 2981). While there was proof as to the amount of money expended for advertising by respondent, there was no proof as to what part of its advertising expense was for "Du Bois Budweiser" advertising (Resp. Ex. TTT, R. 1123a, Opinion of Court of Appeals, footnote 10, R. 5325; T. 2360, 2378).

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[1] The District Court found that the barrel capacity of defendant's brewery was not changed since prior to 1909. It had had the same size kettle continuously since that date. The amount of beer labeled "Du Bois Budweiser" was only a comparatively small percentage of respondent's total output (R. 925a).

[2] The letter "T" refers to transcript of trial and deposition testimony of which only one typewritten copy is on file. The letters "R.....a" and "R" refer to the printed record.

In 1905, a few months after respondent began using the term "Du Bois Budweiser", plaintiff's predecessor demanded that respondent discontinue the use of that term (R. 924a, 5319). Thereafter, in 1906, respondent applied for registration, claiming "Du Bois Budweiser" (together with certain other words and figures) as a trade-mark not only for beer but also for ale and porter (R. 924a, 5319; Ex. 24, T. 445, T. 1918-1922). Petitioner's predecessor opposed that application and the opposition was finally sustained after further notice to and action by respondent in 1919 (R. 927a; Ex. 25, T. 1922).

In 1908, plaintiff's predecessor filed suit in the United States District Court for the Western District of Pennsylvania for an injunction alleging infringement and unfair competition by reason of respondent's use of a label bearing the term "Du Bois Budweiser". The following year, that suit was, with the consent of the respondent, discontinued.

While petitioner, with the exception of the above-mentioned action in the opposition proceeding, took no further action against respondent until notice of petitioner's objections was again given to respondent prior to the institution of the present suit, nevertheless, during the intervening years, petitioner brought nine suits [1] against other infringers to protect its trade-marks "Budweiser" and "Bud", and successfully protested in two additional instances, which were the basis for the District Court's conclusion that petitioner and its predecessors had been

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[1] *Anheuser-Busch, Inc.* v. *Temperance Beverage Co.*, Ex. 109-B, T. 1898; *Anheuser-Busch, Inc.* v. *Budweiser Malt Products Co.*, 287 Fed. 243 (S. D. N. Y., 1921), aff'd 295 Fed. 306 (C. C. A. 2, 1923); *Anheuser-Busch, Inc.* v. *Cohen et al.*, 37 F. 2d 393 (D. C. Md., 1930); *Anheuser-Busch, Inc.* v. *Morris J. Green*, Exs. 112-E, 112-F, T. 1901; *Anheuser-Busch, Inc.* v. *White Eagle Brewing Co.*, Exs. 113-C, 113-D, T. 1903; *Anheuser-Busch, Inc.* v. *Superior Brewing Co.*, Ex. 114-B, T. 1903; *Anheuser-Busch, Inc.* v. *Power City Brewery, Inc.*, 28 Fed. Supp. 740 (W. D. N. Y., 1939); *Anheuser-Busch, Inc.* v. *Manhattan Brewing Co.*, Ex. 115-C, T. 1904; *Anheuser-Busch, Inc.* v. *Bobbie Smith and Sidney Rossi*, Ex. 116-A. T. 1905.

vigilant in protecting their rights and had not acquiesced in infringing uses of their said trade-marks by others (R. 931a).

After the period of Prohibition (1919-1933), petitioner, in 1937, received a report from one of its distributors that respondent was making misrepresentations in connection with the sale and distribution of its beer sold by it as "Du Bois Budweiser" (R. 5054a-5056a). Petitioner's investigations in 1938-1939 revealed that respondent was engaging in a sales campaign of misrepresentations, viz., that respondent's beer was the "Original Budweiser"; that respondent's beer could be supplied without explanation on calls for "Budweiser" or "Bud" and other patently false representations calculated to cause passing off and deception.[1] These investigations also revealed that respondent had begun to extend and was planning and threatening further to extend its sales of its "Du Bois Budweiser" beer to territory where it was not previously sold (R. 926a, 5056a-5057a).

In April, 1940, petitioner brought this suit against respondent in the District Court for the Western District of Pennsylvania (R. 16a).

2. The ultimate questions involved

(1) Was petitioner entitled to an injunction restraining respondent from any further use of the term "Budweiser" with or without the qualifying term "Du Bois", notwithstanding that respondent had used the term "Du Bois Budweiser" since 1905 and this suit was not instituted until April, 1940?

(2) If petitioner was not entitled to such injunction:

(a) Was petitioner entitled to an injunction restraining respondent from using the term "Budweiser" simpliciter (i.e., not accompanied by the name "Du Bois") and from continuing its recent

[1] For complete list see Appendix I, infra, pp. 80-82.

sales campaign of representing that its beer was "Original Budweiser" and that its beer could be sold without explanation on calls for "Budweiser" simpliciter and from making the other misrepresentations listed in Appendix I, infra, pp. 80-82.

(b) Was petitioner entitled to an injunction restraining respondent from extending its use of the term "Du Bois Budweiser" and from using "Budweiser" in any manner in territory in which respondent made or was planning and threatening to make sales shortly before the complaint was filed and after the complaint was filed and before the trial, and where respondent had either made no sales prior to the filing of the complaint or such sales had been made so long ago and were so inconsiderable as to create no substantial business in such territory?

3. The decisions of the District Court and Court of Appeals

The District Court held in the affirmative as to question number 1 above and, since this resulted in enjoining respondent from any use whatever of the term "Budweiser" or its abbreviation "Bud", it was unnecessary for the District Court to rule specifically on the questions under number 2 above. The Court of Appeals held in the negative as to all of these questions and denied petitioner any relief whatever on the ground that petitioner was barred from interfering with the "status quo" on April 20, 1940, the date of filing the complaint.

The District Court's holding that the defense of laches was not available to the respondent was based on its findings: (a) that respondent acted with knowledge of petitioner's rights and fraudulently from the beginning of its use of the term "Du Bois Budweiser" (R. 932a); and (b) that respondent committed supervening acts of fraud in its recent sales campaign (R. 932a); and (c) the necessarily implied finding that the size and extent of respondent's business under the name "Du Bois Budweiser" were

not sufficient to constitute a change of position by respondent in reliance on petitioner's delay in bringing suit to constitute an estoppel.

In thus holding that the delay did not bar relief, the District Court applied the common law of Pennsylvania, citing decisions of the Supreme Court of Pennsylvania and also of this and other courts.

In reversing the District Court, the majority below:

(1) disregarded and in effect set aside, although not holding to be clearly erroneous, and not in fact clearly erroneous, the above decisive findings of fact of the District Court contrary to Rule 52(a) of the Rules of Civil Procedure which provides that such findings shall not be set aside unless "clearly erroneous";[1]

(2) decided several important questions of law in a way in conflict with applicable local (Pennsylvania) decisions; and

(3) departed from the accepted and usual course of judicial proceedings by dismissing on the merits a suit which under its own decision it was necessary for petitioner to bring and prosecute as a prerequisite to any action in which it could ever obtain any relief in respect of rights in any territory and by failing and refusing in any way to define, or to remand to the District Court to define, the so-called "status quo" on the date of filing the complaint with which it holds petitioner to be barred from interfering.

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[1] As we show, infra, pages 26-37, the action of the majority of the Court below in this regard involves not merely the question whether it correctly or incorrectly applied Rule 52(a), if the findings which they set aside were within the scope of that Rule; it involves the broader question whether the majority below were acting under the misconception and erroneous view that the findings set aside were not within the scope of that rule.

II

The Basis Upon Which This Court Has Jurisdiction to Review the Judgment

The statutory provision believed to sustain the jurisdiction of this Court is Title 28, U. S. Code, Section 1254.

The date of the judgment sought to be reviewed is May 12, 1949 (R. 5332). On July 27, 1949, the Court of Appeals entered an order denying a petition for rehearing; on the same day it entered an order denying petitioner's petition for leave to file a supplemental bill of complaint[1] (R. 5461).

This is a civil case governed as to substantive law by the common law of the State of Pennsylvania and as to procedure by the Federal Rules of Civil Procedure.

This Court has jurisdiction to review the judgment of the Court of Appeals reversing the judgment of the District Court (R. 5332) on the following grounds:

1. Failure to act within proper scope of Rule 52(a)

The Court of Appeals disregarded, and in effect set aside, decisive findings of fact of the District Court, not because they were, or were held to be, "clearly erroneous" but because at least two of the Judges of that Court, who were the majority in this case, hold that the provision of Rule 52(a) that findings of fact shall not be set aside unless clearly erroneous, is not applicable to findings of ultimate facts or to inferences drawn from other facts. This is evidenced by their action and statements in this case and in other cases. The propriety of this action by the Court below involves an important question of Federal law under Rule 52(a) of the Rules of Civil Procedure, which

[1] On September 28, 1949, by order of the Hon. Harold H. Burton, the time within which this petition may be filed was extended to and including December 24, 1949 (R. 5465).

has not been and should be settled by this Court, and is also such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Rule 38(5)(b) of this Court and the decisions of this Court in *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212 (1947); *Hickman* v. *Taylor*, 329 U. S. 495 (1947); *Montgomery Ward* v. *Duncan*, 311 U. S. 243 (1940); *Leishman* v. *Associated Wholesale Electric*, 318 U. S. 203 (1943); *District of Columbia* v. *Pace*, 320 U. S. 698 (1944), and *U. S.* v. *Johnson*, 327 U. S. 106 (1946), indicate that this Court will take jurisdiction to review on petitions for certiorari decisions presenting questions under the Federal Rules of Procedure and under the rules defining the scope of appellate review.

The question is substantial since Rule 52(a) involves the scope of review by Federal appellate courts in all civil actions tried by the Court without a jury. In the Third Circuit and in other circuits, there is confusion and divergence of opinion and decision among the various judges constituting these courts, as to the scope of Rule 52(a).

Rule 52(a) of the Federal Rules of Procedure is designed to define the scope of review by appellate courts on questions of fact. A course of practice by an appellate court or by some members of it, which may be a departure from these rules as properly construed, is therefore a matter of serious importance and presents a substantial question. In addition, where there is a divergence of opinion and decision between members of the same court and where, as in the Third Circuit which has six judges, at least two judges make their decisions on the basis that Rule 52(a) has no application to findings of ultimate facts nor to inferences drawn from other facts, the rights of litigants, so far as they turn on the application of Rule 52(a) on appeals to the Third Circuit, which are regularly heard by three of the six judges, depend on which three judges happen to hear and decide their case. Obviously, a situa-

tion in which the scope of review and ultimate decision of a case may depend entirely on chance, i.e., which three of the six judges happen to hear and decide the case, is a serious matter and presents a substantial question which calls for the exercise of this Court's power of supervision to the end that the proper interpretation and application of the rule be settled.

The decisions of this Court which have considered Rule 52(a) have not settled the matter, but on the contrary have resulted in conflicting constructions.[1]

In *United States* v. *Gypsum Co.*, 333 U. S. 364 (1948), this Court held (pp. 394-396) that it was intended by Rule 52(a) to make applicable the then prevailing equity practice and remarked that under that practice:

> "* * * the findings of the trial court when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. The finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

This statement far from settling the application of Rule 52(a) has had conflicting interpretations by different circuit judges. Although this Court distinctly held the findings in the *Gypsum* case "clearly erroneous", the statement

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[1] In *Walling* v. *General Industries Co.*, 330 U. S. 545 (1947), this Court, at page 550, stated that because "the evidentiary facts afford an adequate basis for the inferences drawn by the court * * *, the Court was not clearly wrong"; and in *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271 (1949), this Court, at page 279, stated:

> "But the record in this case, while not establishing to a certainty that the findings are right, fall far short of convincing us that they are clearly erroneous."

However, the findings involved in both these decisions related to conflicting testimony and credibility of witnesses and they appear to have been regarded as so limited.

has been cited for the proposition that in respect to findings of ultimate facts or findings which are inferences drawn from other facts Rule 52(a) has no application, and also that the reviewing court may weigh the evidence *de novo* and hold that a "mistake has been committed" if its conclusion differs from the finding without regard to whether the finding is clearly erroneous.[1] "Clearly erroneous" imports that it is *clear* and therefore objectively demonstrable that the finding is erroneous, whereas the phrase "a firm conviction that a mistake has been committed" because the word "mistake" is not qualified by any such word as "clear", is susceptible of being construed as merely requiring a subjective conviction of mistake or error. This interpretation emasculates Rule 52(a) by, in effect, expunging the word "clearly".[2]

Whatever this Court may have intended by its decision in the *Gypsum* case, the fact remains that the situation is very unsettled, both in the Third Circuit and in other cir-

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[1] See *Hardt* v. *Heller*, 171 F. 2d 644, 648 (C. C. A. 3, 1948), where the *Gypsum* case is cited in an opinion by Maris, McLaughlin and O'Connell, JJ., in support of the proposition that "an incorrect conclusion * * * qualifies as a 'clearly erroneous' finding".

[2] While it is expressly stated in the *Gypsum* case that it was intended by Rule 52(a) "to make applicable the then prevailing equity practice", we find no counterpart in any of the previous equity decisions to the phrase "firm conviction that a mistake has been committed".

The following decisions of this Court, under the equity practice prior to the adoption of the Federal rules, required the following before setting aside findings of fact:

Davis v. *Schwartz*, 155 U. S. 631, 637 (1895), "manifest error", citing *Kimberly* v. *Arms*, 129 U. S. 512, 524 (1889); *Tilghman* v. *Proctor*, 125 U. S. 136, 149, 150 (1888), "unless there clearly appears to have been error or mistake".

Nor do we find in the previous equity decisions of this Court any limitation that excludes from the application of the rule findings of ultimate facts or findings which are inferences from other facts.

Findings were not to be set aside merely because against the weight of the evidence. *Adamson* v. *Gilliland*, 242 U. S. 350, 353, (1917); *Davis* v. *Schwartz*, supra.

cuits,[1] and the reversal of the present case has resulted from this divergence,[2] and we submit that this Court should now settle the scope of Rule 52(a) as regards the power of appellate courts to set aside findings of fact.

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[1] A similar divergence exists in several other Circuits as shown in our brief, infra, pages 48-56.

The Third Circuit, in a decision prior to the *Gypsum* case (*Kuhn* v. *Princess Lida*, 119 F. 2d 704, 706), laid down the rule that "an incorrect conclusion by a trial court qualifies as a 'clearly erroneous' finding, for the correction whereof on appeal Rule 52(a) (Federal Rules of Civil Procedure, 28 U. S. C. A.) specifically provides". This ruling, which in effect expunges the word "clearly" by substituting the word "incorrect" for "clearly erroneous" was cited and applied by the Third Circuit in *Hardt* v. *Heller*, 171 F. 2d 644, 648 (C. C. A. 3, 1948) (Maris, McLaughlin and O'Connell, JJ.), with the statement by Judge McLaughlin "This sound doctrine finds full support in the recent Supreme Court decision of *United States* v. *United States Gypsum Co.*, 333 U. S. 364," and quotes the firm conviction rule stated in the *Gypsum* case.

In *Ball* v. *Paramount Pictures*, 169 F. 2d 317, 318 (C. C. A. 3, 1948) (Biggs, Goodrich and McLaughlin, JJ., Goodrich, J., dissenting), the majority opinion by Judge McLaughlin stated "Nor does the rule operate 'to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings' ", citing the *Princess Lida* case, *supra*.

In re Wolf, 165 F. 2d 707 (C. C. A. 3, 1948) (Maris, O'Connell and Kalodner, JJ.), Judge O'Connell, in a dissenting opinion, takes the position that Rule 52(a) does not apply to an ultimate fact such as intent to defraud, because (p. 711) "Even as a question of fact, it is reviewable on appeal since it is the ultimate fact question, thus one of law". That Goodrich, J., does not share the views of McLaughlin and O'Connell, JJ., is clearly indicated by his dissent in the present case, *Smith* v. *Hiatt*, 170 F. 2d 61 (C. C. A. 3, 1948), and in *Ball* v. *Paramount*, supra, where he said (p. 324):

> "We should not substitute a hunch, however judicial, for facts advertently found."

From the above cases the inference is also that neither Maris, J., nor Kalodner, J., conform to the views of O'Connell, J., in the Third Circuit.

[2] There are opinions in cases in the Third Circuit by Judges O'Connell and McLaughlin, or opinions in which they have concurred

In a recent decision by this Court, *U. S.* v. *Spelar,* 18 L. W. 4012 (1949), this Court found it necessary to interpret its previous decision in *Vermilya-Brown* v. *Connell,* 335 U. S. 377 (1948), which had been given various interpretations by the lower courts, Mr. Justice Frankfurter, saying in a concurring opinion (p. 4014), "When so many able justices can so misconceive the implications of our decision in *Vermilya-Brown Co.* v. *Connell, supra,* as they have been found to misconceive them, the source of difficulty cannot be wholly with these able lower court justices".[1]

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where, in *affirming,* it is stated that findings are not to be set aside unless clearly erroneous. *Barrett* v. *Denver Tramway Corp.,* 146 F. 2d 701, 706; *Smith* v. *McLane,* 174 F. 2d 819, 821. We find no opinions by either Judge O'Connell or Judge McLaughlin where in *reversing* they hold that Rule 52(a) is applicable or binding as to findings of ultimate facts or inferences drawn from other facts, and their view as expressed in their decisions in *reversing* is as stated in the cases we have cited above.

[1] The recent decision of this Court in *U. S.* v. *Yellow Cab Company* (No. 22, October Term, 1949, decided December 5, 1949), 18 U. S. Law Week 4040, refers to Rule 52(a) and holds it to be applicable to such ultimate facts as design, motive and intent, but in that case, as the opinion points out, these ultimate facts depended "peculiarly upon the credit given to witnesses by those who see and hear them". The decision makes no reference to the *Gypsum* case and contains no statement as to how the "firm conviction" statement in that case is to be construed. Consequently, it seems that the decision in the *Yellow Cab* case does not clear up the existing confusion. However, if it is to be regarded as laying down a settled rule that ultimate facts and inferences drawn from other facts are within the rule irrespective of whether conflicting oral testimony or credibility of witnesses is involved, then Rule 52(a) as construed in the *Yellow Cab* case was binding on the Court below, and though the rule was not thus construed until after the decision of this case below, the failure of the Court of Appeals to comply with the rule is reversible error for the correction of which certiorari should be granted. *Marine Bank* v. *Kalt-Zimmers,* 293 U. S. 357, 366 (1934).

2. Decision on Federal question in conflict with decision of this Court

The action of the Court below in holding that a finding which is in reality a finding of fact if stated by the District Court as a conclusion of law, is not to be regarded or observed as a finding of fact (R. 5325, 932a), is a decision on a question of Federal law in direct conflict with the decision of this Court in *Eilers* v. *Boatman,* 111 U. S. 356 (1884), where this Court held that a finding of fact "called by the judge a conclusion of law, is really a finding of facts", and is to be treated as such.

In the present case the majority of the Court below held that because the finding of respondent's fraudulent intent by the District Court was stated under the caption "Conclusions of Law" it was not a finding of fact (R. 5325), and proceeded to make its own finding in regard to the same facts without regard to whether or not it was clearly erroneous. The decisions of this Court in *Faulkner* v. *Gibbs,* 18 L. W. 4015 (1949), 83 U. S. P. Q. 192 (1949); *Altvater* v. *Freeman,* 319 U. S. 359, 363 (1943); *U. S. Industrial Chemicals, Inc.* v. *Carbide Corp.,* 315 U. S. 668, 669 (1942); *Morton Salt Co.* v. *Suppiger Co.,* 314 U. S. 488, 490 (1942); *Lincoln Engineering Co.* v. *Stewart-Warner Corp.,* 303 U. S. 545, 546 (1938), indicate that this Court will take jurisdiction to review decisions on federal questions in conflict with decisions of this Court. The question is substantial since upon it depends whether the scope of review of findings under Rule 52(a) is to be determined by what the findings actually are or by the label they bear. It is also substantial in this case because the Court below held that, as to one of the decisive issues, viz., respondent's fraudulent intent, the District Court did not make a finding to that effect because its findings appear under the caption "Conclusions of Law".

3. Failure to follow applicable local law

The Court below failed to follow the local law (Pennsylvania) on important questions relating to the effect of laches, fraud and estoppel in trade-mark infringement and unfair competition cases,[1] and decided these questions in a way in conflict with applicable local decisions.

The decisions of this Court in *Ruhlin* v. *N. Y. Life Insurance Co.*, 304 U. S. 202, 206 (1938); *Fidelity Trust Co.* v. *Field*, 311 U. S. 169 (1940), indicate that this Court will take jurisdiction to review such decisions on petitions for certiorari. The question is substantial in this case, since upon the rules of law involved the protection and survival of trade-mark rights depend, and protection of the general public is involved.[2] This Court, during the period prior to the decision in *Erie* v. *Tompkins*, 304 U. S. 64 (1938), when these rules were largely formulated and applied by the Federal courts has always considered these questions important. This is evidenced by the granting of petitions for certiorari and the review of the decisions of the lower courts involving these questions in a number of cases. (*Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co.*, 208 U. S. 554 (1908); *Baglin* v. *Cusenier Co.*, 221 U. S. 580 (1911); *Thaddeus Davids Co.* v. *Davids*, 233 U. S. 461 (1914); *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403 (1916).) The fact that since the decision in *Erie* v. *Tompkins* (304 U. S. 64), these questions are governed by local law, instead of by rules evolved by the Federal courts, renders the correct application of these principles as settled by local law no less important.

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[1] The action of the Court below in this regard is discussed, infra, pp. 38-43.

[2] In *Bourjois & Co.* v. *Katzel*, 260 U. S. 689 (1923), Mr. Justice Holmes, in speaking of the nature of a trade-mark, remarked at page 692: "It deals with a delicate matter that may be of great value but that easily is destroyed, and therefore should be protected with corresponding care."

4. Departure from accepted and usual course of judicial proceedings

The Court below departed from the accepted and usual course of judicial proceeding by dismissing on the merits this suit, which under its own decision it was necessary for petitioner to bring and prosecute as a prerequisite to any action in which it could ever obtain any relief in respect of its rights in any territory, and by failing and refusing in any way to define, or to remand to the District Court to define, the so-called "status quo" on the date of filing the complaint, which it holds petitioner to be barred from interfering with.

The decisions of this Court in *Zimmern* v. *United States,* 298 U. S. 167, 169 (1936), and *Electrical Fittings Corp.* v. *Thomas & Betts Co.,* 307 U. S. 241 (1939), indicate that this Court will take jurisdiction when the Court below has departed from the proper course of judicial procedure or has acted in a way that tends to jeopardize rights which a litigant is entitled to have preserved.

The question is substantial for the following reasons:

We know of no precedent which holds that as a condition of being able to protect one's rights, one must first bring, prosecute and lose a suit in which nothing is established except a date line.

The Court below disregarded the fact that before bringing this suit, petitioner gave respondent notice of its intention to bring suit (R. 217a). It also disregarded uncontradicted evidence that shortly before and also after this suit was brought respondent extended and threatened to further extend its sales of "Du Bois Budeweiser" to new territory (R. 926a, 5055a-5057a). The Court below determines that petitioner may not disturb the "status quo" as of the date of filing the complaint, but it did not determine this "status quo" in terms of what the defendant's "localized territory" is, nor did it send the case back to the District Court for such determination.

By refusing to grant leave to file a supplemental bill (R. 5461) based on evidence that since the decision of the Court of Appeals respondent has begun to use the word "Budweiser" in new territory (more than 200 miles from where it had ever sold before), and by making a judgment which in effect requires a dismissal of the complaint on the merits (R. 5328), the Court below relegates petitioner to another suit in which it will have to relitigate most of the principal issues and in which it will be exposed to the hazard of a defense that the dismissal on the merits in this case is a bar to the maintenance of another suit. Assuming that the respondent commits the same kind of acts in new territory, whether the new suit will be for the same or a different cause of action we do not know, and we know of no decisions decisive of this point. In the decisions involving the question of a judgment of dismissal on the merits as a bar to a second suit for the same cause of action, various criteria have been applied by the Courts. Some decisions turn on whether the defendant's acts are the same, some on other considerations, and there seems to be no single settled rule. Under these circumstances, in view of the fact that the opinion of the Court below indicated that petitioner was not to be foreclosed from protecting its rights if respondent extended its activities to other territory (R. 5328), the refusal to make provision whereby these rights will not be jeopardized, either by allowing the filing of the supplemental bill, or by providing that the dismissal of the action should be without prejudice, was a clear departure from accepted and usual course of judicial proceedings, calling for the exercise of this Court's power of supervision. It is in direct conflict with the action of this Court in dismissing, without prejudice, in *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 55 (1909), and *Kansas* v. *Colorado*, 206 U. S. 46, 117, 118 (1907), and also in conflict with the decision in *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241 (1939), in which this Court reversed a decree which failed to leave unadjudicated an issue which the petitioner was entitled to relitigate.

III

Questions Presented

1. Does the rule that findings of fact shall not be set aside unless clearly erroneous:

(a) authorize the Court of Appeals to ignore findings of the Trial Court or to deny that they were made or otherwise fail to give effect to the factual determinations of the Trial Court, not by holding them to be or setting them aside as clearly erroneous but instead by indirection or silence and the substitution of the reviewing court's own judgment of the facts or the application of legal doctrine applicable only to facts contrary to those found by the Trial Court?

(b) apply to findings of the ultimate facts and to the inferences drawn by the Trial Court from the evidence, or does Rule 52(a) apply only to findings of the evidentiary facts?

(c) govern the scope of review in respect to all findings of fact in cases tried without a jury, or does it apply only to findings based on conflicting oral testimony or involving credibility of the witnesses?

(d) require that the findings of fact of the Trial Court shall not be set aside unless clearly erroneous, regardless of how they are denominated or characterized in the decision of the Trial Court, whether as findings of fact or conclusions of law or otherwise, or does Rule 52(a) apply only to findings of fact specifically listed, denominated and characterized as such?

2. If the Court of Appeals is authorized under Rule 52(a) to make its own ultimate findings and conclusions and inferences from the evidence, and to substitute its own findings of the ultimate facts for the findings of the Trial

Court even though the findings of the Trial Court were not clearly erroneous, was this authority properly exercised in the present case?

3. Did this Court intend to emasculate Rule 52(a) by expunging the word "clearly" from the expression "shall not be set aside unless clearly erroneous", by its statement in *United States* v. *Gypsum Co.*, 333 U. S. 364 (1948), that under Rule 52(a) findings of fact may be set aside when the Court of Appeals has a "firm conviction that a mistake has been committed"?

4. Does the decision of this Court in the *Gypsum* case (supra) mean that Rule 52(a) does not apply to ultimate findings which contain any inference or conclusions of fact not involving conflicting testimony or credibility of witnesses?

5. Which of the divergent and conflicting interpretations of Rule 52(a) held by various judges of Courts of Appeal, and that have been causing division in many of the Courts of Appeal, shall be the settled and authoritative interpretation of the Rule?

6. Is an inference and a finding of fraudulent intent clearly erroneous:

(a) where misrepresentation resulting in deception has been made with knowledge of the falsity of the representation (R. 932a, 5325-5327)?

(b) where, as concurrently found by the District Court and the Court of Appeals, confusion of the public has resulted from the sale of goods by respondent under a word known to have been long used by petitioner as a trade-mark (R. 5327), with awareness by respondent that its use was likely to cause confusion of the public?

(c) where, as here, petitioner is not chargeable with laches in respect of respondent's use in its recent sales campaign of the term "Budweiser" simpliciter without the qualifying term "Du Bois", and respondent's president has testified that it was wrong to sell respondent's product as "Budweiser" simpliciter and that the term "Budweiser" identified petitioner's product (T. 12077-12078, 12195); or was it error for the Court of Appeals not to sustain and give effect to that finding as to such conduct by respondent?

7. Respondent having sought to justify its use of petitioner's trade-mark "Budweiser" on the ground that "Budweiser" is the name of a type of beer (R. 56a), there being no other justification for such use, and having offered no justification for its use of petitioner's trade-mark "Bud", does the finding of the District Court which is affirmed by the Court of Appeals, that "Budweiser" is not now and never has been the name of a type of beer (R. 923a, 5321), reasonably support and render not clearly erroneous the ultimate finding and conclusion of the District Court that the respondent's use of "Budweiser" and of "Bud" has been without legal justification and make erroneous the contrary inference of the Court of Appeals and its reversal of the District Court?

8. Is a motive to profit at the expense of another, viz., "a conscious effort to woo" another's customers a necessary element of fraudulent intent (R. 5326)?

9. Do misrepresentations, such as false claims to being the "original", or to having won in the courts the right to use the competitor's name, or to having been given permission by a competitor to use that competitor's trade name, or to a previous connection with a competitor through former officers or employees, or false statements that one's own goods, marked with a competitor's trade name, were made by that competitor, or that they are the same thing (infra, p. 80), constitute fraud and unfair competition

from which the defrauded competitor and the public are entitled to be protected, and do they bar a defense of estoppel, or are such false claims and statements mere "puffing" (R. 5326) to which the law attaches no penalty?

10. Where trade-mark rights are established in the term "Budweiser" by virtue of its secondary meaning, and in the term "Bud" as a distinctive technical trade-mark, by unreversed findings of the District Court (R. 921a, 931a), may a competitor with impunity state that its product is "Budweiser" or "Bud" and advise that its product can be supplied, without explanation, on calls for "Budweiser" or for "Bud", or is such advice fraudulent and unfair competition?

11. Did the Court of Appeals fail to apply the local law of Pennsylvania:

(a) in its action in respect to the matters involved under questions 6 to 10, inclusive, or any of them?

(b) that conduct which tends to cause passing off is actionable and may be enjoined irrespective of proof of actual fraudulent intent, when it refused to grant relief to petitioner against continuance of conduct of that character as to which there was no laches on petitioner's part?

(c) in holding that fraudulent intent is not proved by or inferable from "awareness of the business possibilities" of the name "Budweiser" (R. 5326), which respondent adopted as a part of its trade-mark "Du Bois Budweiser", including "the possibility that unwary purchasers might buy its product" (R. 5326) rather than the product of a competitor who, as respondent well knew, was the prior user of "Budweiser" as a trade-mark, and is its decision in conflict with the decisions of the Supreme Court of Pennsylvania, including, among others, *Portuondo Cigar Mfg. Co.* v. *Portuondo,* 222 Pa. 116, 70 A. 968 (S. Ct. Pa., 1908), and *Pratt's Appeal,* 117 Pa. St. 401, 11 A. 878 (1888)?

(d) in rejecting or refusing to recognize the District Court's finding of fraudulent intent (R. 5325-5327), though affirming the finding of the District Court that the defendant acted with knowledge (R. 5325), and in holding that knowledge is not evidence of fraudulent intent (R. 5326), and is its decision in conflict with the decisions of the Supreme Court of Pennsylvania, including, among others, *Thomson-Porcelite* v. *Harad,* 356 Pa. 121, 51 Atl. (2d) 605 (S. Ct. Pa., 1947); *Consolidated Home Specialties* v. *Plotkin,* 358 Pa. 14, 55 A. (2d) 404 (S. Ct. Pa., 1947), and with the decision of this Court in *Menendez* v. *Holt,* 128 U. S. 514 (1888)?

(e) in holding that protection from infringement and unfair competition may be denied on the ground of laches merely because of the length of the period of delay (R. 5322), and is its decision in conflict with the decisions of the Supreme Court of Pennsylvania, including, among others, *Klepser* v. *Furry,* 289 Pa. 152, 159, 137 A. 175 (S. Ct. Pa., 1927); *Thomson-Porcelite Co.* v. *Harad,* 356 Pa. 121, 51 A. (2d) 605 (S. Ct. Pa., 1947), and *Consolidated Home Specialties Co.* v. *Plotkin,* 358 Pa. 14, 55 A. (2d) 404 (S. Ct. Pa., 1947), and with the decisions of this Court in *Michoud* v. *Girod,* 4 Howard 503, 561 (1845); *Saxlehner* v. *Eisner,* 179 U. S. 19 (1900); *Menendez* v. *Holt,* 128 U. S. 514 (1888); *McLean* v. *Fleming,* 96 U. S. 245 (1877); *French Republic* v. *Saratoga Vichy Co.,* 191 U. S. 427 (1903)?

(f) in requiring as a prerequisite to injunctive relief from trade-mark infringement and unfair competition an affirmative answer to both of the following questions: (1) whether delay in seeking protection was mere laches, and (2) whether the infringer was found guilty of fraud (R. 5321-5322), and is its decision in conflict with the decisions of the Supreme Court of Pennsylvania, including, among others, *Portuondo* v. *Portuondo,* 222 Pa. 116, 70 Atl. 968 (S. Ct. Pa., 1908); *Klepser* v. *Furry,* 289 Pa. 152, 159, 137 Atl. 175 (S. Ct. Pa., 1927); *Thomson-Porcelite*

Co. v. *Harad,* 356 Pa. 121, 51 A. (2d) 605 (S. Ct. Pa., 1947), and *Consolidated Home Specialties Co.* v. *Plotkin,* 358 Pa. 14, 55 A. (2d) 404 (S. Ct. Pa., 1947)?

(g) in treating as abandoned (R. 5323) a trade-mark which never was deliberately and intentionally abandoned and that has not lost its distinctiveness and whose use by a competitor continues to deceive the public (R. 5424-5455), and is its decision in conflict with the decision of the Supreme Court of Pennsylvania, including, among others, *Consolidated Homes Specialties Co.* v. *Plotkin,* 358 Pa. 14, 55 A. (2d) 404 (S. Ct. Pa., 1947)?

(h) in relying upon the voluntary dismissal of the 1908 suit, without prejudice, as evidence upon which it bases estoppel, and is its decision in conflict with the decisions of the Pennsylvania Courts, including, among others, *Engle* v. *Susquehanna Mutual Fire Ins. Co.,* 20 Pa. C. C. 90 (Pa. C. C., 1897), and with the decision of this Court in *Haldeman* v. *United States,* 91 U. S. 584 (1875)?

12. Does the voluntary dismissal of a suit without prejudice destroy the plaintiff's right to relief in a subsequent action on similar grounds or does the earlier suit put the defendant on notice that plaintiff has not acquiesced in the acts complained of and does not intend to abandon the claim on which it is founded but to preserve the right to bring a new suit if it becomes necessary?

13. Is prosecution of infringers evidence that supports an estoppel against the right to protection from the infringing acts of another unfair competitor, or is it an assertion of trade-mark rights and evidence of vigilance in protecting such rights?

14. Was the Court of Appeals, in holding that respondent had changed its position, warranted in inferring that any substantial part of respondent's advertising expenses were spent in advertising "Du Bois Budweiser" where

respondent had failed to offer any evidence to show what part of its total advertising expense had been spent in advertising "Du Bois Budweiser" and where, because the word "Budweiser" was a widely advertised and well known trade-mark identifying petitioner's product there was no basis for inferring that respondent would need to expend any substantial amount to advertise "Du Bois Budweiser"; and was the Court of Appeals warranted in inferring that respondent's sale under the term "Du Bois Budweiser" of a small proportion of the total output of its small brewery created a good will in any particular territory where respondent failed to offer any evidence to show the amount of its sales since Prohibition in any particular city, place, area or territory?

15. Where there has been laches in respect of certain conduct and that conduct is held to have resulted in a change of position, does the scope of an estoppel arising therefrom extend any further than to permit a continuance of that conduct?

16. Did the respondent sustain the burden of proving facts sufficient to show a change of position on its part, and was the Court of Appeals warranted in finding such a change of position?

17. Does the usual and accepted course of judicial proceedings justify or permit dismissal of the complaint on the merits:

(a) of an action which is held to be a necessary preliminary to the bringing of any action in which relief may be obtained?

(b) leaving the plaintiff's rights in respect of certain acts of respondent as to which there is no laches on petitioner's part without protection from the continued wrong?

(c) leaving plaintiff without protection from the continuation of actual and threatened wrongs and injuries, where the Court of Appeals, without reversing the findings and conclusions on the basis of which the District Court enjoined the infringement of plaintiff's rights, reverses the decree on the ground of laches for the professed purpose of maintaining the status quo as of the date when the complaint was filed, but as to territory not entered by respondent prior to that date, states that respondent "should not expect to extend its use of that name to other areas with legal impunity" (R. 5328), and there is uncontradicted evidence of the actual extension of the infringing business both shortly before said date and after said date and prior to the trial, and also of threats of further unlawful extension of defendant's business (R. 5424-5455, 5056a-5057a) to territory where respondent had no previously established business?

(d) on the ground that during the period of delay by petitioner in instituting this suit, respondent had changed its position and established "within its localized areas of distribution * * * a good-will in the name of 'Du Bois Budweiser' ", the existence and extent of such areas not having been found by the District Court because it found no change of position, and the same being one of the controversial and litigated issues in this case, without making a finding delimiting such areas, and granting relief to petitioner against sales outside such areas, or without remanding the case to the District Court for that purpose?

IV

The Reasons Relied on for the Allowance of the Writ

1. Misconception of the scope of Rule 52(a) and misapplication of that rule

In reversing the District Court, the majority of the Court below set aside decisive findings of fact. In doing so it did not attempt to show or even state that these findings of fact were "clearly erroneous". The majority opinion in its discussion of the ultimate and decisive facts of the case gives no indication of its obligation to observe the rule that findings of fact shall not be set aside unless clearly erroneous.

This is not surprising in view of the attitude of the majority in respect to Rule 52(a) as indicated by their prior decisions.[1]

In the view of the Judges constituting the majority of the Court below in this case, Rule 52(a) has no application to findings of the District Court which are inferences drawn from other facts or which are findings of ultimate facts, and in their view its application is narrowly limited to findings of evidentiary facts involving conflicting oral testimony or credibility of witnesses heard by the Trial Judge. This explains the absence of discussion in the majority opinion about Rule 52(a) or its applicability. The only statement in the majority opinion indicating consciousness of the rule is a hypothetical statement having reference not to ultimate facts but merely to evidentiary facts, viz: "were this conclusion based upon findings of fact not clearly erroneous" (R. 5325). This recognition of the rule only in connection with findings of evidentiary facts dovetails exactly with Judge O'Connell's statement in *In re Wolf*, 165 F. 2d 707, 711, that ultimate facts are questions of law and not within the rule.

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[1] *Hardt* v. *Heller*, 171 F. 2d 644; *In re Wolf*, 165 F. 2d 707; *Ball* v. *Paramount Pictures*, 169 F. 2d 317, which we have cited and quoted from supra, p. 12.

The majority below re-weighs the evidence and where it does not reach the same conclusion as the Trial Judge as to findings of ultimate facts or inferences from other facts, they are reversed, irrespective of whether they are "clearly erroneous".

(a) The Finding of Fraud

Respondent's fraud has two aspects, (1) so-called fraud in the inception, i.e., respondent's conduct in adopting the name "DuBois Budweiser" in 1905, and (2) respondent's recent sales campaign and sales methods, which consisted of the misrepresentations listed in the Appendix hereto, and statements by its salesmen that its product could be sold on calls for "Budweiser" simpliciter or for "Bud", and denominating its product "Budweiser" simpliciter and "Bud" on its invoices.

The District Court made a finding of fact which covers both respondent's conduct in adopting the name "Du Bois Budweiser" in 1905 and its recent sales campaign and methods. This finding, although appearing under the caption "Conclusions of Law" is a finding of fact. It is as follows:

> "10. From the beginning, defendant's use of the words 'Budweiser' and 'Bud' has been with knowledge of the rights of plaintiff and of plaintiff's predecessors, and with the fraudulent purpose and intent of confusing and deceiving the public and of enabling defendant's product to be passed off as and for the product of plaintiff" (R. 932a).

The majority opinion holds this finding to be a conclusion of law because it appears under that caption although it is apparent from the opinion of the District Judge that he found fraud and based his decision thereon. The majority opinion even tries to spell out a lack of intention on the part of the District Judge to make a finding of fraud, stating:

> "Although the District Judge had 'more than a suspicion', he apparently was not prepared, nor are we, to state with assurance that there was fraud in the inception" (R. 5326).

This statement will not bear examination. The District Court's finding, although under the caption "Conclusions of Law", was as to matters of fact, viz: the knowledge and intent of the respondent. The action of the majority in treating it as a conclusion of law is in direct conflict with the decision of this Court in *Eilers* v. *Boatman,* 111 U. S. 356 (see Brief, *infra,* pp. 50-51). Also by inaccurately quoting the District Court, the majority opinion gives the impression that by the words "more than a suspicion", the District Court meant "no more than a suspicion", whereas what the District Court actually said in its opinion was:

> "One may be pardoned for more than a *strong* suspicion" (R. 934a). (Italics ours.)

(b) Respondent's Fraud in the Inception

Having unwarrantably relegated the District Court's finding of fact to a conclusion of law, the majority opinion proceeds to reverse it without reference to Rule 52(a). It takes up as matters of fact the substance of this finding of the District Court, viz., respondent's knowledge and respondent's fraudulent purpose and intent, and proceeds to set aside the finding and to hold that there was no fraud in the inception. In doing so, the majority opinion does not recognize that this finding must be held to be clearly erroneous to be set aside, nor does it in any way intimate that Rule 52(a) is applicable. Its approach is significant. It first says: "* * * serious doubts appear. Close analysis of this conclusion is desirable" (R. 5325). In other words, the evidence is to be weighed and the doubts resolved to the satisfaction of the majority irrespective of whether the finding is clearly erroneous. The attitude of the majority is also shown in its comment as to respondent's knowledge of petitioner's use of the word "Budweiser". It says: "The record *amply* supports the

finding of the Court below, however, that DuBois began marketing 'DuBois Budweiser' with full knowledge of the extensive use of the word 'Budweiser' by the Association" (R. 5319). The attitude of the majority obviously is that it is entitled to set aside any finding unless "the record *amply* supports the finding." (Italics ours.)

The majority then proceeds to consider what it believes to be the pertinent facts bearing on the question of the purpose and intent of respondent in adopting the name "Du Bois Budweiser". Again the approach is significant. It is not whether the finding of the Court below is clearly erroneous; it is whether fraudulent purpose and intent has been proved to the satisfaction of the majority and it states that this "has not been proved" (R. 5326) and proceeds to comment upon what it considers to be pertinent facts in this connection and concludes with the following statement:

> "From the foregoing, we would not assert categorically that DuBois remained blissfully ignorant of the possibility that unwary purchasers might buy its product rather than that of the Association; but awareness of the business possibilities of a name is not persuasive proof that the choice of the name was with *fraudulent* intent; i.e., a conscious effort to woo the unsuspecting disciples of the Association products" (R. 5326).

We submit that this statement in effect fully supports the finding of the District Court. At least it does not warrant setting aside that finding as clearly erroneous, merely because the majority below did not consider it "persuasive proof" It in effect concedes that respondent knew (was not "blissfully ignorant") that the public would be deceived. The "business possibilities" obviously were that the use of the name "Budweiser" by respondent would cause the public to buy respondent's beer believing it to be petitioner's. From the point of view of fraud, we have here a conceded false representation and knowledge of its falsity, i.e., the well-known fundamental elements of fraud,

falsity and scienter. In actions for fraud it is well settled that when falsity of representation and scienter have been established, fraudulent intent is to be inferred.[1] That being so, there is no basis for holding that the action of the District Court in making that inference in this case was clearly erroneous.[2]

(c) Respondent's Fraud in Its Recent Sales Campaign

In its consideration of the question of fraud as involved in respondent's recent sales campaign and methods, the approach of the majority below is the same. There is no semblance of observing the requirements of Rule 52(a) or attempt to show that as to the sales campaign and methods of respondent, the finding of the District Court that respondent's conduct had been fraudulent from the beginning and its finding of "supervening fraudulent acts committed by defendant" (R. 932a, 938a, 940a) was clearly erroneous. The majority opinion proceeds to consider the matter as if it were trying the case in the first instance without any reference to the finding of the District Court. It first relegates all respondent's misrepresentations in its recent sales campaign except one to the category of mere "puffing" (R. 5326). In thus holding that these misrepresentations were not acts of fraud nor actionable the majority bases its reversal on supposed error of law but the District Court committed no such error. The error was that of the majority below for representations such as these are by the great weight of authority including decisions of the courts of Pennsylvania, actionable and fraudulent.[3]

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[1] *Claflin* v. *Commonwealth Ins. Co.*, 110 U. S. 81, 95; *Nonantum Co.* v. *Maryland Casualty Co.*, 56 F. 2d 329, 334 (C. C. A. 1, 1932).

[2] Motive is immaterial as an element of fraud. It is immaterial whether the respondent sought an advantage at the expense of the petitioner or sought to damage the petitioner. Consequently an "effort to woo", i.e., to get petitioner's trade, need not be shown.

[3] See Brief, infra, pages 70-72.

The remaining misrepresentation and inducement to pass off, viz., that respondent's product could be supplied to customers ordering "Budweiser" or "Bud" and the use of the terms "Budweiser" simpliciter and "Bud" on respondent's invoices, are not only misrepresentations but direct infringement of petitioner's trade-marks "Budweiser" and "Bud". As to this, the Court below exculpates the respondent with the following statement:

> "• • • if Du Bois reasonably believed it had the right to use the word—and we have found not only that all actions of Du Bois have been in conformance with such belief, but also that the Association and Anheuser generously contributed to its reasonableness—such advice is not fraudulent" (R. 5326-5327).

Since the finding of fraud of the District Court necessarily imports lack of reasonable belief by respondent or of action of petitioner contributing to any such belief, this holding is in effect a setting aside of the findings of the District Court without regard to Rule 52(a). The majority below rides roughshod over the Rule and these findings and substitutes its own independent finding stating "we have found" (R. 5326).

The above quoted statement of the majority opinion indicates that its holding that respondent did not act fraudulently in using petitioner's identical trademark "Budweiser" is based upon two assumptions: (a) that "Du Bois reasonably believed it had the right to use the word", and acted "in conformance with such belief", and (b) that petitioner's action "generously contributed to its reasonableness". Neither of these assumptions, however, has any support in the record and both are in direct conflict with respondent's own testimony. Petitioner's failure to take action to stop respondent's use of the term "Du Bois Budweiser", which so far as the record shows was the only use made by respondent of the term "Budweiser" until its recent sales campaign, was not laches as to "Budweiser" simpliciter and would not warrant any belief on respondent's part that it could use petitioner's identical

trade-mark "Budweiser" without the qualifying word "Du Bois".[1]

Nor is there any basis for the assumption of reasonable belief by respondent of the right to use the word "Budweiser" without the qualifying term "Du Bois" or conduct in conformance therewith that respondent had the right to use the word "Budweiser" without the qualifying term "Du Bois". There is no evidence of use by respondent of the word "Budweiser" without the qualifying term "Du Bois" prior to its recent sales campaign or of any "reasonable belief" of right to do so.[2] On the contrary, respondent denied using "Budweiser" simpliciter without the term "Du Bois", and its president testified that it

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[1] Respondent's fraudulent sales methods were first brought to light by an investigation made by petitioner in 1938 and 1939 as a result of a report received by it from one of its distributors. Even if these sales methods had been of longer standing, as to which there is no evidence, petitioner would not be chargeable with knowledge of them since they were not open and notorious but involved misrepresentations made by respondent's agents to its dealers and statements on respondent's invoices, all of which would not come to petitioner's knowledge in the ordinary course of business. In fact respondent did not admit using "Budweiser" without the word "Du Bois" and seeking to justify it, insisted that it always used the name "Du Bois" in conjunction with the term "Budweiser", and the whole effort in respondent's testimony was directed toward admitting and justifying merely the use of the combination term "Du Bois Budweiser". The only conduct of respondent as to which petitioner can in any case be chargeable with laches is respondent's use of the term "Du Bois Budweiser".

[2] Two statements in the majority opinion that might give the impression that respondent had used or claimed to use "Budweiser" without the name "Du Bois" are misleading: The statement that in 1905 respondent filed an application in which it "laid claim to the word 'Budweiser' " (R. 5319) is misleading in that the mark claimed in the application was not "Budweiser" simpliciter but "Du Bois Budweiser" (R. 924a, Pet. Ex. 24, T. 1922). The statement in the majority opinion that in the 1908 suit petitioner "sought a permanent injunction against the use of the word 'Budweiser' by Du Bois" (R. 5319), while literally correct in that the complaint sought an injunction against any use of "Budweiser" by respondent, is misleading if construed to imply that respondent was using the term "Budweiser" simpliciter at that time. The actual use charged in the complaint was of a label bearing the combination term "Du Bois Budweiser" (R. 1423a, 1435a).

was wrong to sell respondent's beer on calls for "Budweiser" and that a call for "Budweiser" was a call for "Anheuser Busch's" beer.[1]

When the petitioner's case showed overwhelming proof that respondent was making misrepresentations and stating that its beer could be sold on calls for "Budweiser", respondent's president Hahne testified in court and sought to evade his previous testimony by saying that his reason for always using "Du Bois" with "Budweiser" was because he was proud of the name. But when confronted with his previous testimony, that it was wrong to use "Budweiser" simpliciter and that "Budweiser" simpliciter identified pe-

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[1] He testified (T. 12077-78) on examination before trial:

"Q. Now, if a wholesaler or distributor should make inquiry from you as to whether or not it was all right for a person to sell beer labeled 'DuBois Budweiser' on a call for 'Budweiser', what answer would you give him? A. I would tell him no.

"Q. The reason that you would give him that answer would be that you think it is wrong to sell your beer on a call for 'Budweiser'? A. On a call for 'Budweiser', yes.

* * * * * *

"Q. Do you always use the word 'Du Bois' in front of the word 'Budweiser'? A. To the best of my knowledge and belief, yes.

"Q. Well, has that always been the policy of the company? A. Always has, yes.

* * * * * *

"Q. Have you ever seen any beer in this country advertised as Budweiser beer except the beer brewed by Anheuser-Busch? A. Possibly not.

"Q. Well, can there be any question in your mind that you would expect a tavern keeper to hand out beer labeled 'Budweiser' and brewed by Anheuser-Busch, on a call for 'Budweiser'? A. No."

He also testified:

"Q. Is there anywhere else where your beer is sold and Anheuser-Busch beer is sold, too, to your knowledge? A. I imagine there are a number of places. Kittanning, Ridgeway, and most any of the towns in this immediate vicinity.

"Q. Would that be true of almost any town where you sell beer? A. I would think so.

"Q. And in those towns does 'Budweiser' mean the product of Anheuser-Busch Brewing Company or the product of both breweries? A. It means the product of Anheuser-Busch" (T. 12195).

titioner's beer, he was forced to admit that it was true (R. 2317-2320).

The District Court heard this witness testify in open court and, in view of his testimony, was it clearly erroneous for the District Court to appraise the testimony of this witness and conclude that respondent was not acting in any belief that it had the right to use the term "Budweiser" simpliciter and was the Court of Appeals, in the face of this testimony, warranted in setting aside this finding and making a new finding diametrically opposite to the admissions in the testimony of respondent's president Hahne? We submit that the answer to these questions is obvious. The majority simply rode roughshod not only over the findings of the District Court but over the overwhelming weight of the evidence.[1]

(d) The Finding of Change of Position

The majority opinion also without indicating consciousness or obligation in respect of Rule 52(a) holds, contrary to the District Court, that during the delay in bringing this suit respondent has changed its position and as a consequence thereof, petitioner is estopped (R. 5324). The District Court made findings of fact (Findings 31-35) as to the size of respondent's business during the period in question but made no finding that respondent had thereby changed its position and consequently in effect found that respondent had not changed its position (R. 925a). As to this there is a clearcut divergence of views in the court below, the dissenting judge in effect holding with the District Court that respondent did not change its position re-

[1] This finding involves not merely inferences from other facts but direct oral testimony of respondent's president. That, however, did not deter the majority below. Judge O'Connell did not consider Rule 52(a) applicable to findings of ultimate facts, whether or not oral testimony before the District Judge was involved. This is clear from his dissenting opinion in *In re Wolf*, 165 F. 2d 707, 711, where the ulitmate fact, intent to defraud creditors, involved oral testimony. This is, of course, in direct conflict with the recent decision of this Court in *U. S.* v. *Yellow Cab Co.*, decided December 6, 1949, 18 Law Week 4040.

lying upon plaintiff's delay in bringing this suit (R. 5329-5330), whereas the majority, without in any way showing or attempting to show that this was clearly erroneous, holds that respondent has changed its position (R. 5324). Comparing in this connection the facts regarding respondent's business, cited in the dissenting opinion and those relied on in the *majority* opinion it is submitted that the refusal of the District Court to find that respondent had changed its position was not clearly erroneous but in full accord with the weight of the evidence. The majority opinion purports to weigh the evidence in an effort to overcome the convincing demonstration of the dissenting judge but is unable to adduce any significant facts to support its finding. It states (R. 5325) that "Du Bois did spend an appreciable amount of money in advertising its products" but in a footnote to this statement it is conceded that the only proof by respondent is its total advertising expenses and that "what part of these sums may be allocated to Du Bois Budweiser is not disclosed by the record." [1]

The only other fact to which the majority opinion refers as basis for holding that respondent has changed its position is "that Du Bois Budweiser had a noticeable although minority share of the Du Bois output" (R. 5325). We fail to see how the proportion of respondent's total output, sold as "Du Bois Budweiser", is a relevant fact in deciding whether the respondent has carried the burden of proof of showing in any particular place or area it established a substantial business. Nevertheless, the majority opinion jumps to the conclusion that "within its localized areas of distribution, Du Bois assuredly has acquired over the period of years a good will in the name Du Bois Budweiser • • • [1] (R. 5325). This we submit, is a clear illustration of what Judge Goodrich characterized in the dissenting opin-

[1] The majority opinion fails to recognize that the burden of proving change of position was on respondent and that the failure of the record to disclose what part, if any, of respondent's total advertising expense was for the beer it sold as "DuBois Budweiser" was entirely respondent's fault in making no effort to show any allocation.

ion in *Ball* v. *Paramount Pictures*, 169 F. (2d) 317, 374, as deciding on "hunch". The District Court, since it did not hold that respondent changed its position was not called upon to decide in what "localized area", if any, respondent had sustained the burden of proving that it had established a substantial business. The majority opinion makes no finding as to what locality or area, nor does it recognize respondent's failure to sustain the burden of proof in this regard.[1]

Respondent's failure to produce proof from its sales records showing quantities sold in particular places or areas, was not inadvertent but deliberate, for when these exhibits were offered, petitioner's counsel objected that they failed to show quantities. Consequently, the inference arises that such proof, if produced, would have made an unfavorable showing for respondent, within the well settled rule that failure of a party to produce evidence within his possession warrants a presumption that if produced it would have been detrimental to him.[2] And

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[1] Respondent's proofs as to its sales by localities are wholly insufficient to support a finding of a continuous and substantial business in any locality and the District Court was right in rejecting them. Respondent's exhibit (G, R. 5390) showing the places and quantities of beer it sold as "DuBois Budweiser", prior to Prohibition, show nothing continuous or substantial in any places except Buffalo, New York, and Newark, New Jersey, but these were sales to branches which respondent had in those localities and from which the beer was redistributed to various other places. These branches were abandoned during Prohibition and not revived thereafter. Respondent introduced other exhibits (Exs. 7 F's, 7 G's, R. 5408, 5418) purporting to show sales since Prohibition, but these failed to show any quantities whatever in any particular place or locality and were admittedly partly based on hearsay statements of salesmen (T. 2980).

[2] *Rowan County* v. *Banks-Miller Supply Co.*, 95 F. 2d 904 (C. C. A. 6, 1938); *Hoffman* v. *Berwind-White Coal Mining Co.*, 265 Pa. 476, 109 A. 234, 237 (S. Ct. Pa., 1920); *Mahoney* v. *Francis Mulholland Roofing Co.*, 5 A. 2d 812, 814 (Pa. Super., 1939); *Equipment Acceptance Corp.* v. *Arwood Can Mfg. Co.*, 117 F. 2d 442 (C. C. A. 6, 1941); *Harkins* v. *Varone*, 306 Pa. 376, 159 A. 860, 861 (S. Ct. Pa., 1932); *Church* v. *Church*, 25 Pa. 278; *Jacobosky* v. *Zborowjan*, 46 Pa. Super. 626.

this rule is particularly applicable in the case of a party having a burden of proof.

From the foregoing, we submit that the majority below in its treatment of the findings of fact of the District Court has disregarded the requirements of Rule 52(a) and has proceeded on the basis that as to ultimate facts and inferences, the rule has no application. It has been necessary for us to go further and take the space to demonstrate, as we submit we have, that these findings were not clearly erroneous because if they could be considered clearly erroneous, the error of the majority below in not considering them within the scope of Rule 52(a) would not have been prejudicial to respondent and, therefore, there would be no occasion for this Court to allow the writ.

The factual conclusions of the District Judge were at least such as a reasonable man would reach. For this there is ample support in the opinion of the dissenting Judge.

But the reason for allowing the writ is larger than the violation of Rule 52(a) and the prejudice or injustice to the petitioner in this case. As we have shown, it appears that in the Third Circuit, and also in other Circuits, there is a divergence of views as to the applicability of Rule 52(a). Some Judges, including the majority who rendered the opinion below, holding that the rule has no application to ultimate facts or facts which are inferences drawn by the Trial Court from other facts, and in this connection the "firm conviction" rule stated in the *Gypsum* case (333 U. S. 364, 395) has been frequently cited as authority. Unless this Court allows the writ and settles this question, there will continue to be this divergence of views in the Third and other Circuits and the decision of cases will not be in accordance with justice according to settled rules of procedure, but in accordance with the particular views regarding the rule of the majority of the Judges who happen to be sitting when a case is heard.

2. Decision of important questions of local law in conflict with applicable local decisions.

(a) The law of Pennsylvania as to laches.

At the outset of its discussion regarding laches, the majority opinion holds that petitioner, to prevail, must show both, that there was only laches (i.e., no change of position by respondent) *and* that respondent was guilty of fraudulent conduct. Under Pennsylvania law, however, a plaintiff, in spite of long continued delay constituting laches, is entitled to injunction against a continuing tort, such as trade-mark infringement or unfair competition, if either there has been no change of position by the defendant in reliance upon the plaintiff's laches *or* the defendant has been guilty of fraudulent conduct.[1]

In the foregoing discussion as to the findings of fraud and change of position, we submit that we have shown that the majority below was not warranted in reversing either the District Court's findings of fraud or of no change of position and that neither of these findings was clearly erroneous and certainly both were not.

The majority opinion also shows confusion in considering laches and delay synonymous and distinguishing between so-called excusable and inexcusable laches. There are degrees of delay but no degrees of laches. Laches is the legal consequence of inexcusable delay.[2] However, under Pennsylvania law, laches, even in the sense of inexcusable delay, does not per se constitute an estoppel or a bar to an injunction and that is the local law applicable here.[3]

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[1] See Brief, infra, pp. 56-72.

[2] The misconception of the majority below is illustrated by its discussion under the caption "As to the assiduity of Anheuser" (R. 5322) where it holds that unless there was assiduity, there was inexcusable laches, whereas, the law is that if there was "assiduity", the delay is excusable and there is no laches.

[3] *Portuondo* v. *Portuondo*, 222 Pa. 116, 70 Atl. 968 (S. Ct. Pa., 1908); *Klepser* v. *Furry*, 289 Pa. 152, 159, 137 Atl. 175 (S. Ct. Pa., 1927); *Thompson-Porcelite Co.* v. *Harad*, 356 Pa. 121, 51 A. (2d) 605 (S. Ct. Pa., 1947), and *Consolidated Home Specialties Co.* v. *Plotkin*, 358 Pa. 14, 55 A. (2d) 404 (S. Ct. Pa., 1947). See Brief, infra, pp. 56-58.

The majority opinion cites cases to support the proposition that laches in the sense of long continued delay will, in itself, and without more, bar relief. But none of the cases which it cites, nor is any Pennsylvania case, authority for that proposition. The decisions in these cases were not based on the ground that laches (i.e., inexcusable delay) without more, will bar relief, but on the ground that during the period of delay, some other cause had intervened which made it inequitable or improper to grant relief.[1]

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[1] In *French Republic* v. *Saratoga Vichy Co.*, 191 U. S. 427, 436 (1903), relief was denied not merely because of laches, but because during the period of delay the word "Vichy" had been widely used not only by the defendant but also for water "dealt out by the glass under that name in innumerable soda water fountains throughout the country" and for that reason, the Court held (p. 437) "they" (the plaintiffs) "had allowed the name to become generic and indicative of the character of the water".

Similarly in *Procter & Gamble* v. *J. L. Prescott Co.*, 102 F. 2d 773, 780 (C. C. A. 3, 1939), there was not only laches but during the period of delay the infringing use had become so great and widespread that it had, in the language of the Court "engulfed Chase-O in so far as the markets for the two products have coincided or overlapped", and the mark of the first user had lost its distinctiveness.

In the *Valvoline Case*, 211 F. 189 (S. D. N. Y., 1913), there had been substantial change of position by the defendant constituting an estoppel and the defendant's business and sales had been larger than that of the plaintiff.

In *Prince's Metallic Paint Co.* v. *Prince Manufacturing Co.*, 57 F. 938 (C. C. A. 3, 1893), the defendant had been the exclusive user of the mark for a period of nine years and during that period it made much larger sales than the plaintiff's predecessor had ever made and the Court held that the mark had lost its distinctiveness as identifying plaintiff, since the plaintiff had been entirely out of business for ten years.

The majority quotes a dictum from *Consolidated Home Specialties Co.* v. *Plotkin*, 358 Pa. 14 (55 A. 2d 404, 1947), but it is clear that it applies only where during the period of delay the mark has lost its distinctiveness and in that case an injunction was granted notwithstanding laches.

The majority also cites toward the end of the opinion *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U. S. 19 (1900) where again, relief was not denied merely because of laches but because during the period of delay, the name "Hunyadi" was shown to have been used by many different concerns for bitter waters and it ceased to have any distinctiveness as identifying the plaintiff.

It is not clear to what extent the majority opinion rests its decision on the proposition for which it cites these cases: viz., that long continued laches will without more, bar injunctive relief. At the end of its discussion it shifts ground and says: "We are aware that estoppel of Anheuser depends upon a change of position by Du Bois."[1]

To the extent, however, that the majority opinion may be regarded as holding, as applicable here, the cited cases in which, in addition to laches, it was shown that, during the period of delay in bringing suit, the mark had lost its distinctiveness due to general and widespread use, it applies law (including as Pennsylvania Law—the dictum in the *Plotkin* case), which is wholly inapplicable to the case at bar. That the term "Budweiser" did not lose its distinctiveness but continued to identify to the general public petitioner's beer, and that the use of that term by respondent deceives the public was not only specifically found by the District Court (R. 921a, 931a) but was proved beyond the possibility of holding such a finding clearly erroneous.[2]

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[1] Apart from estoppel the majority opinion seems to imply that petitioner's discontinuance of the 1908 suit and its bringing of suits against other infringers without renewing its suit against respondent, amounted to an acquiescence or abandonment. This is contrary, not only to Pennsylvania law, but also to general law which is clearly to the effect that no such effect results from the discontinuance of a suit or from suing other infringers. (See Brief, infra, pp. 59-66.)

[2] This finding was not merely an inference based on petitioner's volume of sales and advertising. There was also direct testimony to this effect from over one hundred and fifty witnesses, many of whom testified at the trial before the District Judge. These included members of the public, some of whom had been actually deceived when purchasing "DuBois Budweiser", manufacturers of beer, brewmasters, distributors, hotelkeepers, restaurant keepers, owners of bars and taverns, bartenders and waiters. And even defendant's president testifying in regard to the word "Budweiser" said: "It means the product of Anheuser-Busch" (T. 12195), and defendant's trade witness Westlaken, when asked the following question: "Isn't it true that when you speak of Budweiser everybody thinks of Anheuser-Busch?" answered: "Well, naturally" (R. 5295a).

It is significant that the majority opinion makes no reference to this finding nor to the evidence underlying it nor any attempt to show that "it was clearly erroneous" and makes no contrary finding. In fact, the majority opinion assumes *arguendo* the existence of plaintiff's secondary meaning. Nevertheless, it attempts to bolster up its decision by the citation of these inapplicable authorities and fails to cite the applicable local authorities in this connection. Although in this part of this petition we are concerned with failure to apply local law, we have had to refer to the District Court's finding that the trade-mark "Budweiser" had retained its distinctiveness as identifying petitioner's beer, since the majority opinion cites, as if it were applicable local law, authority which is wholly inapplicable in view of that finding, its unassailability and the fact that the majority below do not purport to reverse it.

(b) The law of Pennsylvania as to misrepresentations which the Court of Appeals held to be mere "puffing".

The majority of the Court below also failed to follow applicable local law in holding that the misrepresentations made by respondent in its recent sales campaign were merely "'puffing' to which the law attaches no penalty". Under Pennsylvania law as well as under general law, these misrepresentations (listed Appendix I, infra, p. 80) involve false claims of being the "original", and false statements of connections and relationships between petitioner and respondent. As such, they were not only actionable and should have been enjoined but being patently and knowingly false, were also clear evidence of respondent's fraudulent intent supporting and therefore rendering not clearly erroneous the District Court's finding of fraud.[1]

[1] See Brief, infra, pp. 70-72.

(c) The law of Pennsylvania that acts of unfair competition will be enjoined irrespective of actual fraudulent intent.

Respondent's conduct in its recent sales campaign which included use of "Budweiser" simpliciter and "Bud" by invoicing its beer as such and by advising dealers that they could supply respondent's beer without explanation on calls for "Budweiser" simpliciter and "Bud" was, as shown supra, pages 31-32, conduct as to which petitioner is not chargeable with laches. This conduct of respondent is considered in the majority opinion below only in connection with the question of whether respondent was acting with an intentionally fraudulent purpose, i.e., was guilty of such intentional fraud as would bar it from relying upon the defense of estoppel, even if it had changed its position by building up a substantial business during petitioner's delay in bringing this suit. Having set aside the finding of actual fraudulent intent by the District Court (although as shown, supra, pp. 27-30, this finding cannot be held clearly erroneous), the majority below seems to consider that the matter of respondent's conduct in using petitioner's identical trade-marks "Budweiser" and "Bud", has no further legal significance. In so doing, however, it disregarded the law of Pennsylvania, that misrepresentation in trade and unfair competition will be enjoined irrespective of any specific or fraudulent intent.

Since, as found by the District Court and admitted by the majority below "Budweiser" simpliciter and "Bud" identify petitioner's beer and their use by respondent causes confusion, respondent's conduct in this regard constitutes unfair competition which under the law of Pennsylvania will be enjoined without proof of intentional fraud and irrespective of respondent's actual intent.[1]

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[1] *Consolidated Homes Specialties Co.* v. *Plotkin,* 358 Pa. 14, 55 A. (2d) 404 (S. Ct. Pa., 1947); *B. V. D. Co.* v. *Kaufman & Baer,* 279 Pa. 152 (S. Ct. Pa., 1924); *Elliott* v. *Skillcrafters,* 271 Pa. 185 (S. Ct. Pa., 1921); *Pennsylvania Central Brewing Co.* v.

This aspect of the case and the applicable law of Pennsylvania, the majority opinion below completely overlooks.[1]

The action of the Court below in refusing to enjoin and thereby legalizing continuance of respondent's conduct in using plaintiff's identical trade-marks "Budweiser" and "Bud", and in using the term "Original" and making the other misrepresentations made by it in its recent sales campaign, is so contrary to law, penalizing and confiscatory as to make pertinent the comment of Mr. Justice Holmes in *Cocoa-Cola Co.* v. *Koke Co.*, 254 U. S. 143, 145 (1920): "But the defects of the plaintiff do not offer a very broad ground for allowing another to swindle him." Further than this it sanctions widespread fraud and confusion of the public in respondent's so-called localized territory.[2]

Anthracite Beer Co., 258 Pa. 45, 101 Atl. 925 (S. Ct. Pa., 1917); *Scranton Stove Works* v. *Clark*, 255 Pa. 23 (S. Ct. Pa., 1916); *Suburban Press* v. *Philadelphia Suburban Pub. Co.*, 227 Pa. 148, 75 Atl. 1037 (S. Ct. Pa., 1910); *American Clay Mfg. Co.* v. *American Clay Mfg. Co.*, 198 Pa. 189, 47 Atl. 936 (S. Ct. Pa., 1901). See also Brief, infra, pp. 66-70, 73-76.

[1] Not only did the majority below overlook this aspect of the case upon which petitioner is certainly, under the Pennsylvania law, entitled to relief, but it overlooked possible devastating consequences of its decision in this regard. When respondent's beer is supplied on calls for "Budweiser" simpliciter without explanation, it is a representation that respondent's beer *is* "Budweiser". The Court below has legalized that representation and having done so may it not follow, as a necessary consequence of this decision, unless reversed, that respondent within its so-called "localized territory" may now make the same representation; viz., that its beer *is* "Budweiser", in other ways, such as by advertising its beer not as "Du Bois Budweiser" but as "Budweiser" simpliciter and even "Original Budweiser"; by changing its labels to omit the name "Du Bois" altogether therefrom, so that its labels will read "Budweiser" simpliciter, or even "Original Budweiser"; by supplying its retailers with display material reading "Budweiser" simpliciter or "Original Budweiser".

[2] *Consolidated Home Specialties Co.* v. *Plotkin*, 358 Pa. 14, 55 A. (2d) 404, 412 (S. Ct. Pa., 1947); *Thompson-Porcelite Co.* v. *Harad*, 356 Pa. 121, 51 A. (2d) 605, 607 (S. Ct. Pa., 1947).

3. Departure from the usual and accepted course of judicial proceedings by dismissing the complaint on the merits.

This decision, we submit, is an unprecedented anomaly in that it requires that before petitioner can obtain any relief as to any conduct of respondent in any territory it must first bring, prosecute and lose this suit. It in effect holds that petitioner remains indefinitely disqualified (as if it were in contempt of court) from protecting its rights in any way until it brings and prosecutes a suit in which the Court will do nothing but give notice to respondent that it acts at its peril after the date of the filing of the complaint.

This is not the case of an action prematurely brought,[1] for under the decision of the Court below, it was necessary for petitioner to bring this suit as a prerequisite to ever being able to bring a suit in which it may have any relief in respect to any conduct of the respondent.[2] A decision which imposes upon a party the obligation to go to the trouble and expense of bringing and fully prosecuting two suits before it may have any relief is not in accordance with equitable standards or equitable principles.

Since the suit was necessarily brought it was rightfully brought, and we submit that the refusal to grant any relief and the dismissal of such a suit on the merits is unprecedented and a clear departure from the usual and accepted

[1] Even in the case of an action prematurely brought, the proper procedure is to dismiss without prejudice and not on the merits. See *Willcox* v. *Consolidated Gas Company*, 212 U. S. 19, 55 (1909), and *Kansas* v. *Colorado*, 206 U. S. 46, 117, 118 (1907).

[2] This is clear because if petitioner had not brought this suit until later and in the meantime respondent had extended its business to new territory before the filing of a complaint, the new territory under the decision below would be part of the "status quo" as of the date of the filing of the complaint.

course of judicial proceedings. The Court fixes the date of a supposed "status quo" but without in any way determining what that status is in terms of "localized territory" on that date. It bases its decision on an inference that "Within its localized areas of distribution, DuBois assuredly has acquired over the period of years a good will in the name 'DuBois Budweiser'"[1] (R. 5325). This, of course, gives the impression that respondent's sales were made in substantial and continuous quantities in definite and definable localities over the years, whereas that is not the fact. Respondent's own evidence of its sales shows that in many of the localities it claims to have sold there was not sufficient continuity of sales to have established any substantial business, and also that since the commencement of this suit and prior to the trial, i.e., subsequent to the deadline fixed by the Court below, respondent has made sales in places where it had no existing business which were therefore infringements.

The burden of proving change of position, the acquisition of and the establishment in any particular area of a business of sufficient continuity and size to constitute a change of position was on the respondent. The Court below merely inferred a "good will" somewhere without stating where. Its omission to do so was no doubt due to two reasons: (1) respondent's proofs were insufficient, and (2) even if sufficient as to some places or areas, they definitely showed a lack of any substantial business and therefore infringing sales in other places, which the Court

[1] That this inference was unwarranted in view of the lack of respondent's proof as to what amount if any it had spent in advertising "DuBois Budweiser" and the failure of respondent to show the quantities sold by it since Prohibition in any particular place or places, we have pointed out above, supra, p. 36.

would have been obligated to enjoin.[1] In addition, the Court ignored uncontradicted evidence that shortly prior to the commencement of this suit respondent threatened to extend its business to Binghamton, New York, which was outside any territory where it had ever previously sold, by attempting to get a distributor in that place to handle its product, and finally the Court refused to allow the filing of a supplemental bill based upon clear proof that respondent since the decision of the Court of Appeals had extended its business to an area around Malone, New York, more than two hundred miles from where it had ever previously sold (R. 5454-55).

The Court below has not only denied petitioner relief to which it was entitled in a suit admittedly rightfully and necessarily brought, but it has left the matter of respondent's "status quo" and "localized territory" in a state of indefiniteness and confusion. In a subsequent suit will this decision be interpreted as holding that respondent had a "status quo" in every place where it had made any sale at any time prior to the filing of the complaint in this suit?

[1] For example, in West Virginia, prior to Prohibition, respondent had made, according to its own exhibit, sales in only two places in isolated years, viz., Charleston 840 bottles in 1913 and Lansville 2,400 bottles in 1906 (R. 5403). These small and discontinuous sales obviously created no "status quo". Shortly after Prohibition, it began to extend its business into certain towns in West Virginia but in most of these towns the sales were only in the year 1935, in two towns they were only in the years 1933, 1934 and 1935, and in one town in 1935, 1936 and 1937, and the quantities are not stated (R. 5418-19). In eight of the remaining towns in the exhibit, sales are stated to have been made in 1940 and thereafter, and in the remaining eight towns sales are stated to have been made in 1941 or thereafter (R. 5418-19). The sales made in 1940 and thereafter were infringements because respondent's sales prior to that date established no real business in or near these places or even in any place in West Virginia, and although sales were made after the date line fixed by the Court below, no relief is granted. In addition, it should be noted that in all of the places in which respondent claims to have sold since Prohibition in New York State, excepting seven (R. 5419-20), and in Ohio, excepting three (R. 5421), and in many places even in Pennsylvania (R. 5408-17) the sales are stated to have been made merely "intermittently" and in some of these places no sales were made until 1941, after the filing of the complaint in this action.

If not, what is the "status" in territory where respondent may have made some inconsiderable and discontinuous sales prior to the filing of this suit, or in territory where it made sales after the filing of this suit, and what will be the effect in a subsequent suit of the refusal of this Court to give relief as to such sales? The whole matter is left in confusion due to the fact that the Court below did not perform its duty of either determining or of sending the case back for the District Court to determine the extent of respondent's territory. It dismissed the bill on a mere inference that respondent had a status quo somewhere as of April 20, 1940, the extent of which status is to be determined in a later suit.

In other aspects the Court's decision in this case is a departure from the usual and accepted course of judicial proceedings and is also in conflict with the decision of this Court in *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241 (1939). It recognizes the right of petitioner to bring another suit and yet it dismisses the complaint on the merits without reserving this right to the petitioner, thus exposing petitioner to the hazard in a new suit of a defense that such new suit, being based on similar acts by respondent, the dismissal of this suit on the merits is a bar.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Third Circuit, in this action.

Respectfully submitted,

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Dated: December 22, 1949.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Court of Appeals misconceived the scope of Rule 52(a) and misapplied that rule.

The majority decision is an application of an erroneous construction of the rules governing the scope of review which has caused division within the Third Circuit and confusion and uncertainty in that and in other circuits. The findings which, though they were not and were not held to be clearly erroneous, were in effect set aside, were decisive findings of ultimate facts not to be disturbed by the Court of Appeals.

In its decision the majority below:

a. Reversed without holding to be clearly erroneous the findings [1] that

(1) Respondent was guilty of fraud in adopting and in using the name "Du Bois Budweiser".[2]

(2) Respondent was guilty of "supervening fraudulent acts" in suggesting that respondent's beer be substituted "on demand for 'Budweiser' or 'Bud'", in usually invoicing its beer labeled "Du Bois Budweiser" as "Budweiser" or "Bud", in referring in letters to its beer as "Budweiser" and in making numerous other false representations.[3]

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[1] Some of these findings were designated as conclusions by the District Court, but nevertheless they should not have been ignored or reversed unless "clearly erroneous". See *infra*, pp. 50-51.

[2] No. 10, R. 932a. This finding was fully supported by the record (T. 2028, 2034-2035, R. 247a-248a; R. 5299a-5300a; Pet. Exs. 5, 10, 16-19, 21-22, T. 3019, T. 235). Also see *supra*, pp. 27-34.

[3] Nos. 10-11, R. 932a, 938a, 940a. Nos. 37-42, R. 926a. These findings were fully supported by the record (Appendix, pp. 80-82; T. 2321-2322, 2986-2988, Pet. Du Bois Exs. 77-A, 77-B, 99-HH, 99-MM; Pet. Exs. 64-B, C, E, K, 66-J, Q; Pet. Buffalo Exs. 19, 19-A-E, 20, 20-A-N, 35, 35-A-35-F; Pet. Buffalo (1943) Ex. 36). Also see *supra*, pp. 30-34.

(3) Respondent had not changed its position throughout the years it had been selling "Du Bois Budweiser".[4]

b. Substituted for the above findings not held to be clearly erroneous the unwarranted conclusions that

(1) While respondent unquestionably knew of petitioner's wide trade-mark use of "Budweiser" when "Du Bois Budweiser" was introduced in 1905, respondent's conduct with such knowledge does not constitute fraud (R. 5325; also see *infra*, p. 66).

(2) Respondent was merely puffing in representing its beer as the "Original Budweiser" and making numerous other false representations, and was not guilty of fraud in selling (even invoicing) its beer as "Budweiser" and "Bud" and representing that it could be sold on calls for "Budweiser" [5] despite the fact that the District Court found and the majority assumed that petitioner had secondary meaning trade-mark rights in "Budweiser" and respondent's president testified that it was not right so to do and that "Budweiser" meant Anheuser-Busch (R. 5326-5327, 5321; T. 12077-12078; also see *infra*, p. 70).

(3) Respondent spent some money for advertising (the amount on "Du Bois Budweiser" not having been proved). Nevertheless by reason of such expenditures, despite the fact that respondent had never enlarged its plant, respondent had changed its position (R. 5324-5325; footnotes 10-11).

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[4] Nos. 31-35, R. 925a. These findings were fully supported by the record (R. 346a-347a; Resp. Ex. G, R. 5390-5403, R. 264a; Resp. Ex. AAA, R. 1053a, R. 324a; Resp. Ex. TTT, R. 1123a, T. 2378, R. 268a-270a, 352a-353a; Resp. Ex. SSS, R. 1121a, T. 2378). Also see *supra*, pp. 34-37.

[5] The majority opinion (R. 5327) infers that there was no proof of respondent's representation that its beer could be served when petitioner's "Budweiser" was ordered. This inference is contrary to the District Court's finding and to the record. (See record references, footnotes 2-4, *supra*, and 6, *infra*.)

c. Ignored, without reversing, the findings of fact of the District Court that "Budweiser" and "Bud" identify petitioner's beer and that their use by respondent deceives the public,[6] in refusing to enjoin respondent from selling its beer as "Budweiser" simpliciter and as "Bud" and as "Original Budweiser", as to which conduct of respondent there was no laches on petitioner's part.

d. Ignored the finding that respondent began to expand its sales under the term "Du Bois Budweiser" to new territory [7] in refusing to enjoin respondent from using "Du Bois Budweiser" or the term "Budweiser" in any manner in territory where it had no established business.

The majority of the Court of Appeals has drawn inferences and factual conclusions which differ from the inferences, factual conclusions and findings of ultimate facts of the District Court.

The Court of Appeals by holding that because of the existence of laches (in the sense of mere delay) proof of deliberate fraud is required, made the finding of fraud on the part of respondent decisive.[7a] The question of whether fraud existed involved a question of fact.[8] The majority of the Court of Appeals refers to the finding of fraud as a conclusion of law. The apparent excuse for this is that the District Court included the ultimate finding of fraud in a list entitled "Conclusions of Law". Though

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[6] No. 13, R. 921a; Nos. 1, 2, 3, R. 931a. These findings were fully supported by the record. Table II, *infra*, pp. 83-95; T. 1275-1754. Also see *supra*, pp. 2, 33, 40 and *infra*, 61-65.

[7] No. 36, R. 926a. This finding was fully supported by the record (R. 5056a-5057a; Pet. Exs. 7-Fs, 7-Gs, T. 2983). See also R. 5423-5460.

[7a] This error of law is discussed *infra*, pp. 65-72.

[8] *Smith* v. *Craft*, 123 U. S. 436, 441 (1887); *Jewell* v. *Knight*, 123 U. S. 426, 433 (1887); *Ogilvie* v. *The Knox Ins. Co.*, 18 Howard 577, 581 (1855); *Michigan Fire & Marine Ins. Co.* v. *National Surety Corp.*, 156 F. 2d 329, 333 (C. C. A. 8, 1946).

labeled as a conclusion of law, it still is a finding of fact[9] and is subject to Rule 52(a). The Court of Appeals differed with the District Court in its appraisal of these facts and as to the inferences to be drawn from them, and as to the applicable law.

Thus it appears that though the Court of Appeals in effect reversed the finding of the District Court on the question of fraud, and substituted its own finding, it did not demonstrate, nor even claim that the finding of fraud was clearly erroneous.

But, regardless of its reasonableness, the inference drawn by the majority from the undisputed facts is only one of the possible legitimate inferences. The District Court's choice of another permissible inference was not clear error,[10] but in rejecting the conclusion preferred by the District Court, and substituting its own conclusion, the majority decision is clearly erroneous.

In so far as the Court of Appeals' decision rests on estoppel, i.e., change of position by respondent, the majority does not hold clearly erroneous any of the findings of evidentiary facts upon which is based the ultimate finding in effect of the District Court that there was no change of position. It affirms the finding that the barrel capacity of respondent had not been enlarged. It reappraises respondent's investment in advertising, holding that it was "an appreciable amount of money", and by stating in a footnote that: "what part of these sums may be allocated to Du Bois is not disclosed by the record" (R. 5325), admits that this reappraisal is of doubtful value. It finds that

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[9] *Eilers* v. *Boatman*, 111 U. S. 356 (1884); *Hazeltine Corp.* v. *General Motors*, 131 F. 2d 34 (C. C. A. 3, 1942); *Smith* v. *Fletcher*, 152 F. 2d 20 (D. C. App., 1945); *Continental Oil Co.* v. *Jones*, 113 F. 2d 557, 564 (C. C. A. 10, 1940); *Minnesota Mining & Mfg. Co.* v. *Coe*, 125 F. 2d 198, 199 (D. C. App., 1941); *Skelly Oil Co.* v. *Holloway*, 171 F. 2d 670 (C. C. A. 8, 1948); *Refrigeration Engineering* v. *York Corp.*, 168 F. 2d 896, 900 (C. C. A. 9, 1948); *Kochtitzky* v. *John A. Denie's Sons*, 153 F. 2d 520, 522 (C. C. A. 6, 1946).

[10] *United States* v. *Yellow Cab Co.*, 18 L. W. 4040.

the share of respondent's output represented by "Du Bois Budweiser", rather than "a comparatively small percentage", as the District Court found, was "a noticeable though minority share".[11] Obviously, this is not a decision that the findings of the District Court with respect to change of position are clearly erroneous.

That the divergence of opinion in the Court of Appeals which led to the majority's rejection of the findings of the ultimate facts and to the acceptance of those findings by the dissenting judge, is not merely a difference of opinion with respect to the particular facts in this case but represents a division in the Court on the construction of the rules governing the scope of review is demonstrated by the decisions of these judges in other cases in which the Third Circuit Court has divided on this issue or in which they have stated their opinions with respect to their functions as members of a reviewing court. These decisions involving conflicting interpretations of the Gypsum decision (333 U. S. 364, 395) have been discussed in the petition (*supra*, pp. 10-13).

Conflicting constructions of Rule 52(a) also exist in other circuits. In the Eighth Circuit, where prior to the decision in the *Gypsum* case, Rule 52(a) has been strictly applied,[12] the present divergence is well illustrated by decisions in two companion cases, *Nee* v. *Main Street Bank*, 174 F. 2d 425 (C. C. A. 8, 1949), and *Nee* v. *Linwood*, 174 F. 2d 434 (C. C. A. 8, 1949). In these cases where, according to the dissenting opinion of Judge Collet, there was "only a shade of evidentiary difference between the two cases", but the majority affirmed one case and reversed

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[11] For a more complete discussion of the decision of the majority on this point see Petition, *supra*, pp. 34-37.

[12] *Hudspeth* v. *Esso*, 170 F. 2d 418, 420; *Skelly Oil Co.* v. *Holloway*, 171 F. 2d 670, 673; *Cleo Syrup Corp.* v. *Coca Cola*, 139 F. 2d 416, 417; *Twin City Fire Ins. Co.* v. *Green*, 176 F. 2d 532, 535; *McGee* v. *Nee*, 113 F. 2d 543, 546; see also *Montana-Dakota Utility Co.* v. *Federal Power Com.*, 169 F. 2d 392, 398; *Kohl* v. *Commissioner of Internal Revenue*, 170 F. 2d 531, 533.

the other, relying for its action on the "definite and firm conviction" rule announced by this Court in the *Gypsum* case. Judge Collet, dissenting, said (174 F. 2d 425, 434):

> "If the rule of 'firm conviction' is applied in this case, it seems to me that the purpose and intent of Rule 52 will not only be once transgressed, but that it will lead to a disregard of the factual findings of trial courts whenever an appellate court has a 'definite and firm conviction' that even a narrow margin of the weight of the evidence supported a different finding."

The Seventh Circuit has on occasions been divided over the construction of Rule 52(a). *Vargas* v. *Esquire,* 166 F. 2d 651; *Campana Corp.* v. *Harrison,* 114 F. 2d 400. Judge Kerner has stated in a number of opinions that Rule 52(a) is not applicable to inferences and conclusions of fact drawn by the Trial Court, and that the reviewing Court is free to draw its own ultimate findings and conclusions, and has cited the *Princess Lida* decision in the Third Circuit (119 F. 2d 704) in support of this doctrine. *Murray* v. *Noblesville Milling Co.,* 131 F. 2d 470; *Connolly* v. *Gishwiller,* 162 F. 2d 428, 434; *Tyree* v. *Thymo-Borine Laboratories,* 151 F. 2d 621, 624. On the other hand, Mr. Justice Minton, while a member of that Court, adhered to the rule with the statement that findings "will not be disturbed by us if they may be sustained upon any rational view of the evidence, including all reasonable inferences that may be drawn from the evidence". *McComb* v. *Hunt,* 172 F. 2d 751, 754. See also *Lewis Machine Co.* v. *Aztec Lines,* 172 F. 2d 746, 748, and *Wilhartz* v. *Turco Products,* 164 F. 2d 731. In *United States* v. *Johnson,* 149 F. 2d 31, 45, a case involving the finality to be accorded to the findings of a trial judge on a motion for a new trial based on newly discovered evidence, Mr. Justice Minton dissented with the following comment: "We determine only whether the trial court reached a decision it might reasonably have reached upon the facts before it; not on whether we, on those facts, might have reached a different conclusion."

In this dissent he was sustained by this Court in its reversal of the decision of the Court of Appeals in that case, 327 U. S. 106-110.

In the Second Circuit there is also divergence of views regarding Rule 52(a). Judges Frank and Clark take the view that the rule does not apply to findings of ultimate facts and inferences.[13]

The opinions by Judge Learned Hand in the Second Circuit indicate adherence to the Rule.[14]

In the Sixth Circuit Judge Simons and Judge McAllister take the view that the rule has no application to ultimate inferences and conclusions. *Bach* v. *Friden Calculating Machine Co.*, 155 F. 2d 361, 364, Simons, J.; *MacManus Estate* v. *Commissioner*, 172 F. 2d 697, 709, McAllister, J. On the other hand, Judge Allen takes the contrary view. *Keefe* v. *MacComb County*, 140 F. 2d 966, 967.

In the 9th Circuit there is a divergence of views regarding the scope of Rule 52(a) and the interpretation of the decision in the *Gypsum* case. Judge Garrecht holds that

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[13] In *Triangle Publications* v. *Rohrlich*, 167 F. 2d 969, Judge Frank, dissenting at page 976, holds that an inference is "nothing but a surmise, a conjecture, a guess. We are not bound by such a finding. See *U. S.* v. *U. S. Gypsum Co.*, 68 S. Ct. 525; *Best & Co., Inc.* v. *Miller, supra.* We can guess as well as the trial judge." In *Trico Products Corp.* v. *McGowan*, 169 F. 2d 343, Judge Swan stated in an opinion that the Court of Appeals "is at liberty to draw from the evidentiary facts inferences contrary to those of the District Judge", citing among others the *Princess Lida* case (119 F. 2d 704). See also statements by Frank, J., in: *Smith* v. *Samson-United Corp.*, 130 F. 2d 525; *McComb* v. *Utica Knitting Co.*, 164 F. 2d 670; *Kind* v. *Clark*, 161 F. 2d 36; *Schultz* v. *Manufacturers & Traders Trust Co.*, 128 F. 2d 889. Judge Clark in the Second Circuit also takes the view that Rule 52(a) does not apply to "final and ultimate inferences as to states of mind or standards of reasonable notice or duty to inquire" (*Baird* v. *Franklin*, 141 F. 2d 238, 243) and his dissenting opinion in *Best* v. *Miller*, 167 F. 2d 374, 378, recognizes the divergence of opinion in the Second Circuit.

[14] *U. S.* v. *Aluminum Company*, 148 F. 2d 416; *Consumers Import Co.* v. *Kawasaki*, 133 F. 2d 781, 787, aff'd 320 U. S. 249; *United States* v. *Lambert*, 146 F. 2d 469, 471; *Reynolds* v. *Goodwin-Hill Corp.*, 154 F. 2d 553.

an inference from undisputed facts is not within the rule, and cites the decision in the *Gypsum* case as so holding.[15] On the other hand, Judge Pope, in a case involving inferences to be drawn from documentary evidence while citing the *Gypsum* case, does not regard it as excluding such inferences from the scope of the rule, or as warranting setting aside such findings unless "clearly erroneous".[16]

This survey on the conflict and uncertainty with respect to the scope of review in the Second, Third, Sixth, Seventh, Eighth and Ninth Circuits does not pretend to be complete or exhaustive, nor would an exhaustive analysis of the situation in these and all the other circuits be justified or feasible here, or possible. It is reasonable to assume that there are numerous decisions which, like the decision in the present case, represent applications of these divergent constructions of Rule 52(a), which can be recognized as such only by those familiar with the facts in the particular case.

In some Courts of Appeal Rule 52(a) has been applied with consistency, notably in the Court of Appeals for the District of Columbia.[17]

The questions that have been raised with respect to the construction of Rule 52(a) are substantial here, also, because the opinion represented by the majority decision in the present case is an erroneous construction of Rule 52(a), and the error is serious. To hold that Rule 52(a) does not apply to the inferences drawn by the Trial Court from the evidentiary facts, or to the findings of the ultimate facts, and that such findings may be set aside regardless of

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[15] *Home Indemnity Company of New York* v. *Standard Acc. Ins.*, 167 F. 2d 919, 923 (C. C. A. 9, 1948).

[16] *Lassiter* v. *Atkinson Co.*, 176 F. 2d 984, 993.

[17] *Prevost* v. *Morgenthau*, 106 F. 2d 330, 333 (App. D. C., 1939); *Consolidated Realty Corp.* v. *Dunlop*, 114 F. 2d 16, 18 (App. D. C., 1940); *U. S.* v. *Ingalls*, 114 F. 2d 839, 842 (App. D. C., 1940); *Saul* v. *Saul*, 122 F. 2d 64, 67 (App. D. C., 1941); *Minnesota Mining & Mfg. Co.* v. *Coe*, 125 F. 2d 198, 199 (App. D. C., 1941); *Moore* v. *Guy*, 135 F. 2d 476, 478 (App. D. C., 1943).

whether they are clearly erroneous, is in effect to strike Rule 52(a) from the statute books in so far as its provision with respect to the scope of review is concerned. The findings of such ultimate facts as are necessary to reach a decision are the only findings that a Trial Court is required to make,[18] and a construction of Rule 52(a) as inapplicable to these findings of ultimate facts, inevitably results in having the rule disregarded, as it was in the present case, whenever the majority of the reviewing Court are inclined to follow a "hunch" (as Judge Goodrich said in his dissenting opinion in *Ball* v. *Paramount* Pictures [19]) or for any other reason are inclined to disagree with the judgment of the Trial Court, and the outcome of appeals becomes dependent upon the temperament, inclinations and psychological make-up of the Court. This changes basically the character of review on appeal provided by statue.

II

Under local law (Pennsylvania) petitioner was entitled to injunctive relief.

(1) *Mere lapse of time does not constitute laches and does not bar injunctive relief from unfair competition regardless of the length of time involved.* The majority opinion admits that *mere delay* will not bar relief, but adds that the delay must not be too long. It states: "Certainly we have found no case in which injunctive relief was granted after an inexcusable delay for a comparable period of time" (R. 5323).

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[18] *Klimkiewica* v. *Westminster Deposit and Trust Co.*, 122 F. 2d 957, 958 (App. D. C., 1941); *Skelly Oil Co.* v. *Holloway*, 171 F. 2d 670, 673 (C. C. A. 8, 1948); *McGee* v. *Nee*, 113 F. 2d 543, 546 (C. C. A. 8, 1940).

[19] 169 F. 2d 317, 324 (C. C. A. 3, 1948).

The period of delay in the present case is called "more than thirty years" by the majority below (R. 5322, 5327). In so doing, the majority ignores the District Court's finding of notice to respondent in 1919 in connection with petitioner's opposition (R. 927a), and ignores even petitioner's notice of intention to bring the present suit, which was several years prior to the filing of the complaint (R. 940a). It ignores the fact that except for the use of the combination term "Du Bois Budweiser" all of respondent's ways of infringing petitioner's trade-mark and methods of unfair competition are recent. But, assuming a delay of thirty years, granting injunctive relief under such circumstances is not unprecedented. In a case which is cited in the District Court opinion (R. 940a) the same period of delay was involved and the infringer was enjoined.[1] An early decision by this Court[2] which has been recognized as the leading case on this question[3] involved a delay of thirty-six years.[4]

The applicable Pennsylvania law is stated in the dissenting opinion below:

> "It is perfectly clear in the Pennsylvania decisions, the federal decisions and the text books that a mere lapse of time is not sufficient to constitute laches" (R. 5329).[5]

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[1] *Grove Laboratories, Inc.* v. *Brewer,* 103 F. 2d 175, 177, 185 (C. C. A. 1, 1939).

[2] *Michoud* v. *Girod,* 4 How. 503, 561.

[3] *McIntire* v. *Pryor,* 173 U. S. 38, 54 (1899).

[4] *French Republic* v. *Saratoga Vichy Co.,* 191 U. S. 427 (1903), cited by the majority below, was a case of involving not "mere delay" or "mere laches", but loss of distinctiveness and estoppel. See Petition, *supra,* p. 39.

[5] The footnote to the dissenting opinion reads as follows: "In Klepser v. Furry, 289 Pa. 152, 159, 137 Atl. 175, 177 (1927), the Court said: 'In suits for unfair competition or infringement it is well settled that mere laches in the sense of delay to bring suit does not constitute a defense. Such laches may bar an accounting for

In *McLean* v. *Fleming,*[6] both "unreasonable delay" and "inexcusable laches" were proved, but it was held that even under such circumstances it is the duty of the court to enjoin further infringement of trademark. The rule laid down by this Court is that "where consent by the owner to the use of his trade-mark by another is to be inferred by his knowledge and silence only, 'it lasts no longer than the silence from which it springs; it is, in reality, no more than a revocable license'."[7] This is also Pennsylvania law.[8]

In *Menendez* v. *Holt,* supra, Chief Justice Fuller also said, "But there is nothing here in the nature of an estoppel, nothing which renders it inequitable to arrest at this stage any further invasion of complainants' rights. There is no pretense of abandonment"[9] Likewise, in the present case, there is nothing in the nature of an estoppel and no evidence of abandonment, and if the majority below had applied the Pennsylvania law it would necessarily have had to sustain the injunction decreed by the District Court.

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past profits, but will not bar an injunction against a further continuance of the wrong.' See Consolidated Home Specialties Co. v. Plotkin, 358 Pa. 14, 55 A. 2d 404 (1947); Juan F. Portuondo Cigar Mfg. Co. v. Vincente Portuondo Cigar Mfg. Co., 222 Pa. 116, 70 Atl. 968 (1909); Saxlehner v. Eisner, 179 U. S. 19 (1900); Menendez v. Holt, 128 U. S. 514 (1888); McLean v. Fleming, 96 U. S. 245 (1877); 2 Nims, Unfair Competition and Trade-Marks, § 409 (4th Ed., 1947); 2 Callmann, Unfair Competition and Trade-Marks, § 87.3 (1945)."

[6] 96 U. S. 245, 251, 258 (1877).

[7] *Menendez* v. *Holt,* 128 U. S. 514, 524 (1888), citing Duer, J., in *Amoskeag Mfg.* v. *Spear,* 2 Sandford (N. Y.) 599.

[8] *Consolidated Home Specialties Co.* v. *Plotkin,* 358 Pa. 14, 55 A. 2d 404 (1947).

[9] 128 U. S., at p. 524.

(2) *The majority of the Court below based estoppel on a reappraisal of the facts found by the District Court and also on facts from which the District Court reasonably had inferred that respondent acted with notice and that are evidence of the assertion of trade-mark rights inconsistent with an estoppel.*[10]

The majority of the Court below claimed (a) that the voluntary discontinuance in 1909 of the suit by petitioner's predecessor against respondent had lulled respondent "into a false sense of security", and (b) that petitioner's defense of its trade-mark rights against other infringers during the years that followed the discontinuance of the first suit against respondent further supports the estoppel[11] (R. 5323-4). The District Court, to the contrary, inferred from these facts that respondent acted with notice (R. 940a). In setting aside this finding of the District Court the majority below has applied doctrines in conflict with Pennsylvania law and also in conflict with the weight of authority.

(a) *Under Pennsylvania law respondent was not entitled to rely upon the dismissal without prejudice of the previous suit as evidence of petitioner's acquiescence, but, to the contrary, was on notice that petitioner was not abandoning its claim.*

There is no dispute over the fact that the dismissal of the previous suit in *1909* was voluntary and without

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[10] In *Menendez* v. *Holt*, 128 U. S. 514, 523, it was held that mere delay cannot defeat the remedy by injunction "unless it has been continued so long and under such circumstances as to defeat the right itself." The circumstances that may bar relief are circumstances that give rise to an estoppel, that is, it must be shown that the infringer or unfair competitor changed his position, in reliance upon the trade-mark owner's misleading representations or silence. Where deliberate fraud is also proved, even estoppel does not justify denial of relief. See pages 65-72, *infra*.

[11] The phase of estoppel which relates to change of position is discussed in the Petition, *supra*, pp. 34-37, and under Point I of the Brief, *supra*, pp. 51-52.

prejudice. Under Pennsylvania law such a discontinuance "means no more than a declaration of the plaintiff's willingness to stop the pending action; it is neither an adjudication of his cause by the proper tribunal nor an acknowledgment by himself that his claim is not well founded".[12]

The decisions of this Court have been to the same effect.[13] This is a well-established rule which has been applied frequently in actions to enjoin trademark infringement and unfair competition.[14]

The conclusion of the District Court in the present case that when the respondent consented to the withdrawal of the previous suit it "faced the fact that the suit might again be brought" and that its subsequent action therefore was with notice of petitioner's claim of rights, conformed with Pennsylvania law, and in setting aside this conclusion and in holding that the facts in connection with the previous action were evidence in support of an estoppel the decision below is in conflict with the law of Pennsylvania and with the decisions of this Court.

(b) *Petitioner's prosecution of other infringers does not support an estoppel against the right to claim protection from infringement by respondent.* To the contrary, it is an assertion of trade-mark rights inconsistent with an

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[12] *Engle* v. *Susquehanna Mutual Fire Insurance Co.*, 20 Pa. C. C. 90 (1897).

[13] *Haldeman* v. *U. S.*, 91 U. S. 584, 586 (1875). See also *Baer Bros.* v. *Denver Railroad*, 233 U. S. 479, 491 (1914).

[14] *Moline Plow Co.* v. *Omaha Iron Store Co.*, 235 Fed. 519, 524, 525 (C. C. A. 8, 1916); *Edward & John Burke* v. *Bishop*, 175 Fed. 167 (S. D. N. Y., 1910); *Garrett & Co.* v. *Schmidt Wine Co.*, 256 Fed. 943, 948 (D. Ohio, 1919); *Groblewski* v. *Chmiell*, 268 Fed. 240 (C. C. A. 1, 1920); *Chapin Sacks* v. *Hendler Creamery*, 231 Fed. 550 (D. Md., 1916), modified as to the terms of the injunction but otherwise affirmed 254, Fed. 553 (C. C. A. 4, 1918); *Rothman* v. *Greyhound Corporation*, 175 F. 2d 893, 895 (C. A. 4, 1949).

estoppel.[15] There are cases where such lack of diligence in protecting a trade-mark results in loss of the trade-mark's distinctiveness, and where this has happened the failure to stop other infringers may be the basis of an estoppel or it may be held to imply an intent to abandon,[16] but it seldom is claimed and never, to our knowledge, has been held that diligence in protecting trade-mark rights against other infringers bars relief in a suit for infringement of that trade-mark.

In the present case the District Court found that petitioner and its predecessors had been "vigilant in protecting their rights" and had "not acquiesced in infringing uses of their said trade-marks by others" (R. 931a). The majority below concur in this finding (R. 5322) and cite no Pennsylvania decisions, nor the decisions of this or of any other court, in support of its doctrine that diligence in protecting a trade-mark will bar relief from another infringer. We know of no decisions to this effect. This is not surprising because it is not diligence, but lack of diligence, in protecting a mark that would be pleaded as evidence of estoppel.[17]

(3) *There is no evidence or finding of loss of distinctiveness, and the unreversed finding of an exclusive association between "Budweiser" and petitioner's product, and the concurrent findings of actual confusion and of continued likelihood of confusion of the public contradict any implication of abandonment.*

There is not and could not be any claim of intentional abandonment of trade-mark rights by petitioner, but the

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[15] *Actiengesellschaft, etc.* v. *Amberg*, 109 Fed. 151 (C. C. A. 3, 1901).

[16] *French Republic* v. *Saratoga*, 191 U. S. 427 (1903); *Saxlehner* v. *Eisner*, 179 U. S. 19, 35 (1900).

[17] See *Hub Clothing Co.* v. *Cohen*, 270 Pa. 487, 113 Atl. 677 (1921).

majority below questions whether the long delay prior to the filing of the complaint was not "an actual abandonment of the exclusive right as far as Du Bois was concerned" (R. 5323). In support of this conclusion the majority cites *Consolidated Home Specialties* v. *Plotkin,* 358 Pa. 14, 30, 55 A. (2d) 404, 412 (1947), quoting the following statement by Chief Justice Maxey:

> "If the owner of a trade name acquiesces so long in the use of that name or in a name strikingly similar thereto that the public has in general become aware of the other's appropriation of that name and is therefore not deceived, such owner may in a proper case be treated as having abandoned his one-time property rights in that name" (R. 5324).

This statement is dictum. The Pennsylvania Supreme Court in that case rejected the defendant's plea that the plaintiff's conduct had amounted to more than mere laches, and held the plaintiff entitled to protection.

The concurrent finding of deception of the public, in the present case, eliminates any implication of loss of the distinctiveness of "Budweiser" as petitioner's trade-mark. Respondent would have had to prove that "Budweiser" had ceased to be associated in the public mind exclusively with petitioner's goods, and thus had ceased to have a secondary meaning associated with petitioner and petitioner's products, and that the public had become so aware of the use of "Budweiser" on respondent's beer that it no longer was deceived by this use. The District Court found that "Budweiser" has a secondary meaning, indicating petitioner's product exclusively, and is used by the public to designate the beer of petitioner and of no one else (R. 921a, 931a), and these findings are not reversed. The District Court also found likelihood of deception and actual deception of the public as a result of the use of the name "Budweiser" by respondent (R. 926a), and the Court of Appeals concurs in this finding (R. 5327). Therefore even under the facts as they are found by the majority below, the present case does not come within the dictum of the *Plotkin* case.

To construe the dictum in the *Plotkin* case as holding that infringement by a single infringer if long continued results, as a matter of law or of necessary inference, in total loss of distinctiveness and abandonment of the mark, irrespective of the factual situation that the mark continues to identify the original proprietor, would be a holding which in effect overrules the well-considered decisions of the Supreme Court of Pennsylvania, including the decision in the *Plotkin* case itself, which granted injunctive relief in spite of long continued infringement.[17a]

That such a construction is unwarranted is also clear from Judge Maxey's qualifying words "in a proper case" and his citation of the leading English case, *Ford* v. *Foster*, L. R. 7 C. H. 611, where the test is stated to be factual, viz., "if the mark has come to be so public and in such universal use that nobody can be deceived by it * * *"[17b]

[17a] *Consolidated Home Specialties Co.* v. *Plotkin*, 358 Pa. 14, 55 A. 2d 404 (1947); *Schireson* v. *Shafer*, 354 Pa. 458, 47 A. 2d 665 (1946); *Klepser* v. *Furry*, 289 Pa. 152, 137 A. 175 (1927); *Juan F. Portuondo Cigar Mfg. Co.* v. *Vincente Portuondo Cigar Mfg. Co.*, 222 Pa. 116, 70 A. 968 (1908).

[17b] Even if there were absent from this case the overwhelming proof, including testimony of respondent's president and the unreversed finding of the District Court, that "Budweiser" means Anheuser-Busch (*supra*, pp. 2, 33, 40), respondent's proofs as to its use of the term "Du Bois Budweiser" would not warrant any inference that the term "Budweiser" simpliciter does not identify petitioner's beer or, that in the language of the Plotkin dictum "the public has in general become aware of the other's appropriation of that name and is therefore not deceived". Respondent's proofs are wholly insufficient in that regard for the following reasons:

(a) It has failed to show the amount sold since Prohibition in any particular place or area.

(b) In most places it claims to have sold since Prohibition, the sales are stated to have been made "intermittently".

(c) Sales in barrels have no impact on the public consciousness, as pointed out by Judge Goodrich in his dissenting opinion, because, in most cases, they do not see the tap handle bearing the term "Du Bois Budweiser".

(d) Even as to sales in bottles, (1) there is no proof as to the extent of respondent's distribution in any particular place or area,

The decisions of other Courts cited in this connection by the majority below do not help the majority's position on abandonment.[18]

Under the law of Pennsylvania injunctive relief never is denied because of laches, and one reason for this, as Justice Maxey indicated, is concern for the welfare of the public. The facts which warrant denial of relief are facts which show that there was more than mere laches, and which establish conditions under which the use of identical names by different concerns is not likely to cause confusion because the public has become aware of the situation "and is therefore not deceived".[19]

It is often said that fraud is present in every case where unfair competition or trade-mark infringement is proved, but so used the word "fraud" means an act calculated to cause deception. Such fraud is implicit in infringement of a trade-mark and its proof therefore is not required.[20] The infringer is presumed to intend the probable consequences of his acts. The "fraud" that is in issue in the present case is deliberate fraud, such as bars a defense of estoppel, and the statement in the majority opinion that "the lower Court here has spelled out 'fraud' from the fact the consuming public has experienced some confusion" (R. 5327) is not correct. The Court inferred fraudulent intent from all the circumstances surrounding respondent's adoption of "Du Bois Budweiser", including the celebrity of "Budweiser" as petitioner's brand of beer, respondent's familiarity with "Budweiser" as petitioner's trade-mark, and the absence of any reason for the choice of "Du Bois Budweiser" by respondent except to take advantage of

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i.e., whether in one bar or tavern or in how many, and (2) it appears from the testimony that frequently the term "Du Bois" is either not noticed or those who see it believe that respondent's beer is "Budweiser" brewed by petitioner in Du Bois.

[18] See Petition, *supra*, p. 39.

[19] *Consolidated Home Specialties Co.* v. *Plotkin*, *supra*.

[20] See pages 66-68, *infra*.

the good will already associated with "Budweiser". The proof of actual deception of the public shows that respondent's fraudulent purpose was fulfilled (R. 926a, 938a).

(4) *Under Pennsylvania law, laches in the sense of inexcusable delay but without elements of estoppel does not bar injunctive relief; and where, as here, the infringer is guilty of fraud, even estoppel is no defense.*

The statements of the majority below that the questions "* * * are, (a) whether 'laches is the most appropriate term which may properly be applied to the inactivity of Anheuser toward Du Bois, and (b) whether Du Bois was proved to be guilty of fraudulent conduct" and "to prevail Anheuser needs an affirmative answer to both questions" (R. 5321-5322) are neither Pennsylvania law nor are they general law as set forth in the decisions of this Court. *Klepser* v. *Furry*,[21] cited by the majority below (R. 5321), makes no such requirement and is not an authority for the rule applied by the majority below. That case involved "mere laches", but no intentional "fraud" in a sense in which the majority uses the word in this connection, and relief was granted. The Supreme Court of Pennsylvania there stated the rule to be that "in suits for unfair competition or infringement it is well settled that mere laches in the sense of delay to bring suit does not constitute a defense. Such laches * * * will not bar an injunction against a further continuance of the wrong." In the *Portuondo* case[22] there was more than mere laches, but there was also a finding of fraud and relief was granted. The Supreme Court of Pennsylvania said that "the doctrine of estoppel is only applied to promote justice and fair dealing, never to aid a fraudulent purpose".

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[21] 289 Pa. 152, 159, 137 Atl. 175, 177 (1927).

[22] *Portuondo Cigar Mfg. Co.* v. *Vicente Portuondo*, 222 Pa. 116, 70 Atl. 968, 976 (1908).

Again, in the *Plotkin,* case also cited in the majority opinion, where there was no proof of fraudulent intent and the delay in bringing suit was "mere laches", relief was granted, and neither in the decision of the *Plotkin* case nor in the dictum as to the effect of acquiescence or implied abandonment quoted from that case [23] by the majority below can there be found any such rule as is stated in the majority opinion here. The majority opinion also cites *McLean* v. *Fleming,*[24] but that decision supports the Pennsylvania rule, not the rule laid down by the majority below. This Court in *McLean* v. *Fleming* acknowledges the right to injunctive relief in a "case of acquiescence *or* want of fraudulent intent". (Emphasis supplied.) It did not hold that there must be both acquiescence *and* fraudulent intent.

In *Menendez* v. *Holt,* the doctrine of *McLean* v. *Fleming* was reaffirmed.[25]

(5) *Respondent's fraudulent acts should be enjoined as unfair competition.*

(a) *Under Pennsylvania law, the proof of respondent's knowledge established its fraudulent intent.*

The majority below concedes that respondent acted with knowledge both of petitioner's use of "Budweiser" and of the likelihood of deception of purchasers (R. 5319, 5325-5326), but holds that respondent is not chargeable with fraud, saying "mere knowledge • • • does not constitute fraud" and "awareness of the business possibilities of a name is not persuasive proof that the choice of the name was with *fraudulent* intent; i.e., a conscious effort to woo the unsuspecting disciples of the Association products" (R. 5325, 5326).

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[23] See page 62, *supra.*

[24] 96 U. S. 245, 257 (1877).

[25] 128 U. S. 514 (1888). See also *Rothman* v. *Greyhound Corp.,* 175 F. 2d 893, 896 (C. A. 4, 1949).

This is not Pennsylvania law.

The Supreme Court of Pennsylvania recognizes awareness of the business possibilities of a name as a reason for rejecting a denial of fraudulent intent. In *Pratt's* appeal [26] that Court said:

> "The defendant denies any intention of deception * * *. But the thought naturally suggests itself, why did the defendant * * * adopt the symbol which had been in use in the Darlington family for over 70 years, unless at some time, or in some way, he hoped to benefit by the wide reputation which the Darlington butter had obtained?"

In *Thomson-Porcelite Co.* v. *Harad*,[27] the Pennsylvania Supreme Court said:

> "Whether adoption by appellant of the name 'Porcelene' was innocent or for the purpose of deceiving prospective purchasers, and securing unfair benefits from appellee's good-will and reputation may best be determined from the fact that the name 'Porcelite' was known to appellants."

The decision in the *Portuondo* case goes even further. There the Pennsylvania Supreme Court held that the extensive business in which the plaintiff employed the name "Portuondo" must have been known to the plaintiff:

> "Plainly here was duty resting on the defendants to make inquiry as to their rights with respect to a name, thus publicly and widely employed by another.

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[26] 117 Pa. St. 401, 11 Atl. 878, 880 (1888).

[27] 356 Pa. 121, 51 A. 2d 605, 607 (1947). The English rule is the same, as stated by Lord Justice Lawrence in *Reddaway* v. *Hartly*, 48 R. P. C. 283, 299:

> "The reason given by the Defendant for using the words 'Camel Hair' was that those words had a certain selling advantage. In view of what we know of the history and uses of those words, that can only mean this, that the selling advantage of which he is speaking consists of the use of the plaintiff's well known Trade Mark, and, that by adopting that Trade-Mark, the Defendant secured an improved chance of selling his goods."

> * * * The use by the defendant company of the name 'Portuondo' is consistent with no honest purpose that we can discover. * * * The facts are pregnant with suspicion that the purpose in acquiring the name was to mislead and deceive the public * * *." [28]

The majority decision cites no authorities in support of its proposition that knowledge does not prove fraud. It suggests that the facts in the present case are peculiar because "others were using the name" that petitioner's predecessor had "declared in a public proceeding that 'no one can have an exclusive right' to the word"; that "* * * Du Bois made no attempt to copy the Association's labels"; and that "* * * the lower court accepted as true the testimony that the President of Du Bois had visited Germany and there become familiar with the beer of Budweis" (R. 5326).

Under Pennsylvania law the mere fact that others had infringed petitioner's trade-mark "Budweiser" is no defense.[29] In any event, contrary to the implication from the statement of the majority below as to use by others, the only such uses at the time were (1) in a geographical sense in a small area in the Eastern Seaboard, and (2) one or two possibly insignificant local infringing uses which were later discontinued (R. 920a-921a, 935a-936a).

It is a *non sequitur* to hold that respondent was not fraudulent in using petitioner's trade-mark because he did not commit a further act of fraud by copying petitioner's labels. *Continental etc.* v. *Brancato,* 173 F. 2d 296, 298 (C. C. A. 8, 1949).[30]

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[28] *Portuondo Cigar Mfg. Co.* v. *Portuondo,* 222 Pa. 116, 70 Atl. 968, 975, 976 (1908)

[29] *Hub Clothing Co.* v. *Cohen,* 270 Pa. 487, 113 Atl. 677 (1921); *Pennsylvania Central Brewing Co.* v. *Anthracite Beer Co.,* 258 Pa. 45, 101 Atl. 925 (1917).

[30] In restricting the rule that injunctive relief is not barred by laches to cases where the trade-mark infringer also copied the trade-mark owner's labels, the majority below failed to follow Pennsylvania law and misconstrued the decisions of this Court in the *Saxlehner* and *French Republic* cases which granted relief analogous to that requested here to prevent unfair competition.

The declaration attributed to petitioner's predecessor that " 'no one can have an exclusive right' to the word" (R. 5318) refers to an argument not emanating from Anheuser-Busch but from counsel (Resp. Ex. 7O's, R. 1298a) in connection with an application for registration of "Budweiser" in the Patent Office. Apparently, the 1886 lawyers did not know of the prior acquisition of Conrad's rights by plaintiff's predecessor (R. 920a, Pet. Ex. 119C). In any event, this argument of counsel was erroneous in law and not binding on petitioner because statements in briefs or arguments of counsel are not binding as disclaimers or estoppels.[31]

Furthermore, it is well settled that a statement in a former judicial proceeding is not the basis for an estoppel where it is merely an assertion of a conclusion of law, or where the party asserting the estoppel fails to show that he knew of and acted on the statement.[31a] There is no evidence whatever in this case that respondent when it adopted the term "Du Bois Budweiser" in 1905 had any knowledge of the statement made by petitioner's attorney in the Patent Office proceeding in 1886.

At most this statement of counsel in 1886 could amount to no more than a recognition that a geographical term is not an arbitrary or technical trade-mark. If construed as meaning that trade-mark rights can never be acquired in a geographical term, it was erroneous in law and could not preclude petitioner or its predecessors from acquiring rights by secondary meaning.[32]

There is no testimony and the only support for the assertion of the majority that the respondent's president learned about "beer of Budweiss" in Germany is an ad-

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[31] *Grodsky* v. *Sipe*, 30 F. Supp. 656, 662 (E. D. Ill., 1940).

[31a] See Corpus Juris Secundum Title "Estoppel", Vol. 31, pages 389, 390.

[32] *Aunt Jemima Mills Co.* v. *Rigney & Co.*, 247 Fed. 407, 408-409 (C. C. A. 2, 1917).

vertising pamphlet distributed by respondent which was offered in evidence as Defendant's Exhibit GG (R. 1036a), which pamphlet was objected to by petitioner as not being competent to show the truthfulness of the statements therein contained (R. 293a). There is no record of the Court's ruling on the offer of this exhibit. Nor did the District Court accept as true any alleged testimony on this subject (R. 934a).

The majority below does not find that respondent adopted the name "Du Bois Budweiser" with awareness of other infringing uses of "Budweiser", or in reliance upon a statement in a document in the Patent Office files; but the majority below does find that respondent adopted the name "Du Bois Budweiser" with full knowledge of the use of "Budweiser" as a well-known brand name for a competitor's beer and with awareness of the "business possibilities" of the name. Under the law of Pennsylvania applied to the facts concurrently found by both Courts below, fraudulent intent is a necessary conclusion.[33]

(b) *Under Pennsylvania law and general law, respondent's misrepresentations in its recent sales campaign were not mere "puffing" but actionable unfair competition which should be enjoined.*

Following are examples of the Pennsylvania and general law disregarded by the majority below and which require reversal of its denial of relief to petitioner in connection with respondent's misrepresentations characterized by the majority below as "puffing" and for purposes of brevity, we refer to them by the numbers as listed in the Appendix (*infra*, pp. 80-82):

1 and 7 (*infra*, pp. 80, 81). "False representations that ones goods or business are the original or only goods of a particular brand is unfair competition and should be

[33] See Petition, *supra*, pp. 42-43.

enjoined".[34] This is the law of Pennsylvania.[35] Respondent's claim to originality was patently false and not mere "puffing" but fraud, because petitioner's predecessors had thirty years priority in the use of the trade-mark "Budweiser" before respondent began to use "Du Bois Budweiser". "Representations either express or implied that the original article is a spurious article will be enjoined as unfair competition." [36]

11 and 12 (*infra*, pp. 81, 82). Misrepresentation of a decree and the outcome of litigation will be enjoined.[37]

13 (*infra*, p. 82). Even where there has been a prior connection by employment or otherwise, it is settled that the announcement of a former connection must be wholly free of any artifice or device calculated to deceive the public and pass off the new goods or business as those of the original trader. "One may tell the truth but must tell it in a wholly truthful way." [38] This is Pennsylvania law.[39] Here there is no question as to whether respondent has

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[34] 38 Cyc. 848, 63 C. J. 464.

[35] *Portuondo Cigar Mfg. Co.* v. *Portuondo Cigar Mfg. Co.*, 222 Pa. 116, 70 Atl. 968, 972, 973. See also, *Dewees* v. *Schneider*, 35 U. S. P. Q. 27, 29, 31-32 (Court of Common Pleas, Phila. County, 1937); *Lone Ranger, Inc.* v. *Cox*, 124 F. 2d 650, 652 (C. C. A. 4, 1942); *Westphal* v. *Westphal's World's Best Corporation*, 216 App. Div. 53, 62-63 (N. Y., 1st Dept., 1926), aff'd 243 N. Y. 639 (1926).

[36] 38 Cyc. 849; *Elliott* v. *Skillkrafters*, 271 Pa. 185, 114 Atl. 488 (1921).

[37] *Rollman Mfg. Co.* v. *Universal Hardware Works*, 238 F. 568, 569 (C. C. A. 3, 1916); *Gardner Sign Co.* v. *Claude Neon Lights, Inc.*, 36 F. 2d 827, 3 U. S. P. Q. 262 (W. D. Pa., 1929).

[38] 63 C. J. 464; *Andrew Jergens Co.* v. *Bonded Products Co.*, 21 F. 2d 419, 424, 425 (C. C. A. 2, 1927); *Pillsbury* v. *Pillsbury Washburn Flour Mills Co.*, 64 F. 841, 849 (C. C. A. 7, 1894).

[39] *Van Stan's Stratena Co., Ltd.* v. *Van Stan*, 209 Pa. 564, 58 Atl. 1064 (1904); *Gamlen Chemical Co.* v. *Gamlen*, 79 F. Supp. 622, 635 (W. D. Pa., 1948); *Colton* v. *Thomas*, 2 Brewst. (Pa.) 308, 7 Phila. 257 (Common Pleas, Phila., 1869).

truthfully represented the facts because there never were any such former connections; the statements were entirely false, and *a fortiori* should be enjoined.[40]

14 and 15 (*infra*, p. 82). It is fundamental unfair competition law that respondent will be restrained from representing that its goods are manufactured by petitioner or that respondent's goods are the same thing as or substantially identical to petitioner's goods. This is Pennsylvania law.[41]

This Court in a recent decision said that material representations on which credulous persons were entitled to rely "went beyond presumable 'puffing' of seller's wares", and that such misrepresentations if made with intent to deceive justify findings of fraud.[42] This is the standard that the Pennsylvania courts have applied. The statement of the majority below that respondent's misrepresentations "are 'puffing' to which the law attaches no penalty" is in conflict with Pennsylvania law. The doctrine of "puffing" has no application to false representations of material facts, such as respondent has made, particularly when they are likely to deceive, and as the record shows, they were passed on by the trade to the public in selling respondent's beer and did deceive purchasers.[43]

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[40] Nos. 9 and 10 (*infra*, p. 81) importing that defendant was a licensee are in the same category.

[41] *B. V. D. Co.* v. *Kaufmann & Baer Co.*, 272 Pa. 240, 116 Atl. 508, 12 T. M. R. 169, 172 (S. Ct. Pa., 1922); *Scranton Stove Works* v. *Clark*, 255 Pa. 23, 99 Atl. 170, 7 T. M. R. 20, 27 (S. Ct. Pa., 1916); *Feasel* v. *Noxall Polish Mfg. Co.*, 268 Fed. 887, 892 (E. D. Pa., 1920).

[42] *Riley* v. *Pinkus*, announced Nov. 14, 1949, 18 L. W. 4021.

[43] *Harris* v. *Rosenberger*, 145 F. 449, 455 (C. C. A. 8, 1906); 55 C. J. 139; R. 926a, 938a, 5327, 5331; see Petition, *supra*, p. 41.

III

Under the majority decision petitioner was required to bring this suit for relief that could not and would not be granted, and to prosecute it though its dismissal was fore-ordained, in order that petitioner may sue again for protection of such rights as it may have, which a dismissal on the merits leaves unprotected from continued and threatened infringement and uncertain even as to the right to sue for their protection.

(1) *The injunction granted by the Trial Court is barred by the Court below solely because of laches. But petitioner is left without protection from unfair competition not affected by such laches and estoppel.*

This suit is for infringement of petitioner's trade-mark "Budweiser" and also for infringement of petitioner's trade-mark "Bud", and acts of unfair competition related to the infringement of these marks. The decree of the District Court granted full relief and disposed of all the issues, so that it was not necessary for the District Court to distinguish by separate findings between the different acts which constitute the infringement and unfair competition, or to particularize in findings when the various acts were committed. The record clearly shows, however, that the unfair practices and misrepresentations to which the District Court referred as "unfair competition" and as "supervening fraud" [1] are of recent date and certainly petitioner had no notice of these practices on which the Court below based its finding of laches.

In reversing the decree of the District Court and ordering dismissal of the complaint because of laches and estoppel, the Court below makes no distinction between respondent's 30-year use of "Du Bois Budweiser" and respondent's more

[1] R. 932a, 937a-938a, 940a. See also: *supra*, pp. 30-34, 40, 70-72 and *infra*, pp. 80-82.

recent acts of unfair competition. These acts of unfair competition are not considered in the majority opinion except in relation to the question of whether respondent was guilty of such fraud as to be barred from claiming an estoppel. However, quite apart from the question of estoppel, these were acts calculated to cause passing off, and as such constitute unfair competition, from which petitioner was entitled to protection by an injunction, regardless of proof of fraudulent intent. It is well established Pennsylvania law that in cases of unfair competition "innocent intention is not a defense to the application of an injunction". In Pratt's appeal [3] the Supreme Court of Pennsylvania said:

> "If the defendant's print is an imitation of that of the plaintiff's,—if it is calculated to deceive and mislead,—the motive of the defendant in adopting it is not material, so far as the law of the case is concerned, however much it might affect it in a moral point of view."

In so far as the District Court held these more recent acts of respondent to be unfair competition, the Court below does not reverse the conclusion of the District Court. It merely ignores the issue. But by ordering dismissal of the complaint it leaves petitioner without the protection to which it was held entitled. This is contrary to the accepted and usual course of judicial proceedings and clearly unjustified.[4]

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[3] 117 Pa. 401. See also *Consolidated Homes Specialties Co.* v. *Plotkin*, 358 Pa. 14, 55 A. (2d) 404 (S. Ct. Pa., 1947); *B. V. D. Co.* v *Kaufmann & Baer*, 279 Pa. 152, 14 T. M. R. 203 (1924); *Scranton Stove Works* v. *Clark*, 255 Pa. 23; *Pa. Central Brewing Co.* v. *Anthracite Brewing Company*, 258 Pa. 45; *Suburban Press* v. *Philadelphia Suburban Pub. Co.*, 227 Pa. 148, 75 Atl. 1037 (S. Ct. Pa., 1910); *American Clay Mfg. Co.* v. *American Clay Mfg. Co.*, 198 Pa. 189, 47 Atl. 936 (S. Ct. Pa., 1901); *Elliott* v. *Skillkrafters*, 271 Pa. 185.

[4] See footnote 30, *supra*, p. 68.

Warner v. *Lilly* [5] was a suit to enjoin alleged infringement of a trade mark and acts of unfair competition which are described in the decision of this Court as follows:

> "There is much conflict in the testimony; but on the whole it fairly appears that petitioner's agents induced the substitution, either in direct terms or by suggestion or insinuation. Sales to druggists are in original bottles bearing clearly distinguishing labels and there is no suggestion of deception in those transactions; but sales to the ultimate purchasers are of the product in its naked form out of the bottle; and the testimony discloses many instances of passing off by retail druggists of petitioner's preparation when respondent's preparation was called for. That no deception was practiced on the retail dealers, and that they knew exactly what they were getting is of no consequence. The wrong was in designedly enabling the dealers to palm off the preparation as that of the respondent."

This Court held that the word claimed as a trade-mark was a descriptive word. No question with respect to any secondary meaning was involved, and because of the fact that the word was not available as a trade mark the judgment of the Third Circuit Court of Appeals, which had held that the charge of infringement was not sustained, was affirmed, but the judgment was reversed on the issue of unfair competition.

> "The charge of unfair competition being established, it follows that equity will afford relief by injunction to prevent such unfair competition for the future. Several acts of unfair competition having been shown, we are warranted in concluding that petitioner is willing to continue that course of conduct, unless restrained. * * *
>
> But respondent being entitled to relief, is entitled to effective relief; and any doubt in respect of the extent thereof must be resolved in its favor as the innocent producer and against the petitioner, which

[5] 265 U. S. 526, 530, 531, 532 (1924).

has shown by its conduct that it is not to be trusted. Clearly, the relief should extend far enough to enjoin petitioner, and its various agents, from, directly or indirectly, representing or suggesting to its customers the feasibility or possibility of passing off Quin-Coco for Coco-Quinine."

In the present case petitioner is left not only without protection such as the protection to which, under the decision of this Court, it was entitled, but also is left in uncertainty of its rights because of possible technical questions with respect to a prior adjudication which might have to be settled in any future suit to enjoin continuation of the unfair competition. There is uncertainty also because of ambiguous statements in the majority opinion which suggest that the majority below approved the sale of respondent's beer in response to requests for "Budweiser". Under the decision below petitioner may be compelled to enter into further litigation with great uncertainty as to its possible outcome.

(2) *The announced purpose of the decision is maintenance of a "status quo", and at the time when the decision was handed down the "status quo" had already been breached, but the decision fails to provide for its restoration and maintenance.*

The majority opinion states that the parties "should be left in the same situation as they were on April 20, 1940, the date of filing of the instant complaint" (R. 5328). The decision includes no provision for carrying out this professed purpose.[6]

The decision below leaves petitioner to the hazards of further litigation to secure injunctive relief from violations of the "status quo" announced by the Court below, and to secure protection from the threat of extension of respondent's infringement of its trade-mark into new terri-

[6] Petitioner filed petition below for re-hearing and for leave to file supplemental bill of complaint, both of which were denied (R. 5461).

tories and from continued unfair competition by acts such as were proved at the trial. Even where a defendant to a suit for trade-mark infringement has discontinued the acts complained of and has asserted that he has no intention of commiting such acts in the future, the Pennsylvania Court has held the plaintiff entitled to injunction.[7] In the light of denials of charges of infringement and the contesting of an action for the protection of the plaintiff's trade-mark rights, such promises to discontinue are not accepted,[8] and where the infringing acts were committed by employees and agents of the defendant it is held that the defendant and not the plaintiff must run the risk of their repetition in the future.[9]

In the present case the infringing acts of unfair competition were not discontinued before or even after suit was brought, and there have been no assertions on the part of the respondent that it intends to cease making misrepresentations or that it intends to restore and maintain the "status quo" referred to in the majority opinion. The Court below, in holding that the risk is wholly petitioner's, reaches a conclusion contrary to Pennsylvania law.

(3) *The majority below has announced that respondent's use of "Du Bois Budweiser" should be confined to localized territory, but does not define that territory nor provide for its determination by the District Court, and leaves petitioner without protection and in uncertainty as to what rights it may claim and may seek to protect in another suit.*

The decision below is based on the existence of "goodwill" in connection with respondent's use of "Du Bois Budweiser" in localized territory. The majority opinion

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[7] *B. V. D. Co.* v. *Kaufmann & Baer,* 279 Pa. 152, 14 T. M. R. 203 (1924); *Scranton Stove Works* v. *Clark,* 255 Pa. 23, 99 Atl. 170 (1916).

[8] *Scranton Stove Works* v. *Clark, supra.*

[9] *B. V. D.* v. *Kaufmann & Baer, supra.*

does not explain what it means by "good-will" in this connection [11] and does not say how the territory in which such good-will exists shall be determined.

The District Court did not find any "good will" belonging to respondent in any territory in connection with the use of "Du Bois Budweiser", and the majority opinion contains no finding as to what respondent's localized territory may be, nor would this be a finding that, in the expected and usual course of judicial proceedings, should be made by a reviewing court.[12] Under the doctrines applied by the Court below, petitioner was entitled to a determination by the Trial Court of the facts with respect to the localized territory, and to an injunction against the extension of respondent's use of "Du Bois Budweiser" beyond this localized territory.

(4) *The majority below makes the present suit, though foreordained to dismissal, a prerequisite for seeking protection of whatever rights survive.*

The majority of the Court of Appeals recognizes the existence of trade-mark rights of petitioner not affected by the laches and estoppel held to bar relief, but under the doctrine applied by the majority the extent of petitioner's protectable rights could not be determined until after this suit was brought and dismissed. In order to have a basis for bringing a suit which would not be dismissed on the grounds of laches and estoppel and to get any relief, it was necessary for petitioner to bring the present suit, prosecute it and have it dismissed. The majority opinion suggests no other means by which petitioner could proceed.

We believe that such a decision departs from the accepted and usual course of judicial proceedings, and that it compels litigation which is needlessly wasteful of the time of the Court and contrary to orderly civil procedure.

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[11] See footnote 17b, page 63, *supra*.

[12] *Price* v. *Johnston*, 334 U. S. 266, 291 (1948).

CONCLUSION

For the reasons stated in this brief and petition, petitioner respectfully requests that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Third Circuit, in this action.

Respectfully submitted,

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APPENDIX

TABLE I

Defendant's Fraudulent Misrepresentations in its Recent Sales Campaign

1. That defendant's beer was "the original Budweiser".[1]
2. That defendant's products may be supplied lawfully to the public without explanation when "Budweiser" is called for.[2]
3. That defendant's products may be lawfully supplied to the public without explanation when "Bud" is called for.[3]

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[1] Silknitter: R. 5083a; Brayshaw: R. 5090a; Cook: R. 5057a; Ketzer: R. 5140a-5141a; Hartl: R. 5094a, 5096a; Rowe: R. 5149a; Balcom: R. 5108a-5109a; Mazer: R. 5111a-5113a; Mauro: R. 5115a; Charlell: R. 5150a; Ernst: R. 5120a; Diebold: R. 5122a; Bergman: R. 5107a; Buechl: R. 5101a, 5103a, 5106a; Dalberth: R. 5154a; Stewart: R. 5060a, 5062a; Lamont: R. 5131a-5132a, 5133a; Koehle: R. 5135a-5136a and Gusky: R. 5137a; Kohlman: R. 5028a; Bonynge: R. 5022a; Seery: R. 5001a-5007a; Murray: R. 5007a-5009a; Ex. 49-B; R. 5011a; Struich: T. 1054, 1060; De Piero: R. 5143a, T. 1069-1070; Esser: R. 5147a; Meehan: R. 5124a, 5125a; Maguire: R. 5091a, 5092a; Rohrer: R. 5064a-5065a; Vittengl: R. 5086a; Michel: R. 5070a; Maloney: R. 5127a.

[2] Silknitter: R. 5083a; Ketzer: R. 5141a; Hartl: R. 5097a; Rowe: R. 5149a; Mauro: R. 5114a; Diebold: R. 5121a-5122a; Buechl: R. 5102a; Lamont: R. 5131a-5132a, 5134a; Koehle: R. 5135a-5136a and Gusky: R. 5137a; Kohlman: R. 5026a, 5031a; Bonynge: R. 5022a-5023a; Seery: R. 5001a-5007a; Murray: R. 5007a-5009a; Ex. 49-B; R. 5014a; Struich: T. 1056; Meehan: R. 5124a-5125a; Maguire: R. 5093a; Vittengl: R. 5086a; Michel: R. 5067a, 5070a; Crist: R. 5079a-5080a; Jaranowski: R. 5152a; Taylor: R. 5145a-5146a; Lyke: R. 5049a, 5051a-5054a.

[3] Mauro: R. 5114a; Kirchoff: R. 5118a.

4. That the patent or formula was stolen from defendant by Anheuser-Busch.[4]

5. That the DuBois Budweiser Company had the original "Budweiser" formula.[5]

6. That "Budweiser" and defendant's beer marked "DuBois Budweiser" are both originals.[6]

7. That defendant's beer marked "DuBois Budweiser" was made before Anheuser-Busch made "Budweiser" beer.[7]

8. That DuBois had the name "Budweiser" copyrighted in Pennsylvania before Anheuser-Busch.[8]

9. That Anheuser-Busch had consented to defendant's use of the term "Budweiser" on its goods.[9]

10. That Mr. Busch gave Hahne permission to use the name "Budweiser".[10]

11. That DuBois Brewing Company has the right adjudicated in its favor to use the term "Budweiser" on its goods.[11]

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[4] Silknitter: R. 5083a; Speece: R. 5043a.

[5] Marinello: R. 5039a; Speece: R. 5043a-5044a.

[6] Michel: R. 5067a-5068a, 5070a.

[7] Cook: R. 5057a; Charlell: R. 5150a; Buechl: R. 5103a; McCarthy, R. 5156a-5159a; Meehan: R. 5125a.

[8] Kirchhoff: R. 5117a.

[9] Taylor: R. 5145a; Kohlman: R. 5030a.

[10] McLean: R. 5056a; Kohlman: R. 5030a.

[11] Crist: R. 5075a, 5077a-5078a; Brayshaw: R. 5090a; Day: R. 5139a; Seery: R. 5001a-5007a; Murray: R. 5007a-5009a; Ex. 49-B: R. 5014a; Taylor: R. 5145a; Meehan: R. 5125a.

12. That Anheuser-Busch takes DuBois to court every so often and the case is thrown out and defendant is permitted to use the term "Budweiser" on its beer.[12]

13. That defendant's goods are or have been made by plaintiff's original brewmaster; or that Hahne had been connected with Anheuser-Busch before going to DuBois.[13]

14. That "Budweiser" and defendant's beer marked "DuBois Budweiser" are made by the same concern.[14]

15. That "Budweiser" and defendant's beer marked "DuBois Budweiser" are the same thing or contain the same ingredients.[15]

16. That DuBois used the same water as the Anheuser-Busch people.[16]

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[12] Michel: R. 5066a; Koehle: R. 5136a and Gusky: R. 5137a; Seery: R. 5001a-5007a; Murray: R. 5007a-5009a; Ex. 49-B: R. 5014a; Bonynge: R. 5023a-5024a.

[13] Seery: R. 5001a-5007a; Murray: R. 5007a-5009a; Ex. 49-B: R. 5014a; Lamont: R. 5131a-5132a, 5134a; Kohlman: R. 5030a; Bonynge: R. 5023a; Taylor: R. 5145a.

[14] Brayshaw: R. 5090a; Mazer: R. 5112a.

[15] Vittengl: R. 5087a-5088a; Marinello: R. 5036a; Hartl: R. 5095a; Barco: T. 1091; Rohrer: R. 5065a; Lamont: R. 5134a; Maguire: R. 5091a, 5092a.

[16] Marinello: R. 5039a.

TABLE II

Testimony That "Budweiser" and "Bud" Identified Only Anheuser-Busch Since Long Prior to 1905 [1]

Localities	Dates	Witnesses	Town Deposition taken	"Budweiser" and "Bud" Identified Only Anheuser-Busch [2]	Familiar with "Budweiser" advertising [2]
			CONNECTICUT		
Bridgeport	About 1894-Pro.	Taylor	Bridgeport	13515-7, 21	13522-4
	1894-Pro.	Smith, F. L.	Bridgeport	13542-3, 7, 53	13548-9
	1902	Balgley	Hartford	R. 5259a-5260a	R. 5257a
Hartford	1901-Pro.	Weiss	Hartford	13620-3, 9	
	1902-Pro.	Balgley	Hartford	R. 5254a-5255a	R. 5258a

[1] This table is limited to states where respondent, subsequent to 1905 and prior to Prohibition, claimed to have sold its beer.

[2] Page numbers below 10,000 will be found in *Trial Transcript*, and page numbers above 10,000 will be found in *Deposition Transcripts*.
References to printed *Appendix* to Brief of Plaintiff-Appellee below are designated "R.....a."

Localities	Dates	Witnesses	Town Deposition taken	"Budweiser" and "Bud" Identified Only Anheuser-Busch	Familiar with "Budweiser" advertising
		CONNECTICUT (Continued)			
New Britain	1902	Balgley	Hartford	R. 5259a-5260a	R. 5257a
New Haven	1892-Pro.	Coffey	New Haven	13479, 84	13481, 2
	1902	Balgley	Hartford	R. 5254a, 5259a, 5260a	R. 5257a
New London	Late 1880s-Pro.	Freeman	New London	13420-2, 4-9	13425-6
	1890-1912	Collins	New London	13391-3	13391
	1899-Pro.	White	New London	13407-9, 14	
	About 1900-About Pro.	Perrine	New Haven	13461-2, 77-8	13470-1
	1905-Pro.	Clark	New London	13395, 400, 1	13396, 402
Putnam	1902	Balgley	Hartford	R. 5259a-5260a	R. 5257a
Waterbury	1902	Balgley	Hartford	R. 5259a-5260a	R. 5257a
Willimantic	1902	Balgley	Hartford	R. 5259a-5260a	R. 5257a
All Connecticut except New London	1902-Pro.	Balgley	Hartford	R. 5259a-5260a	R. 5257a

MARYLAND

Baltimore	1897	Harley	Philadelphia	R. 5179a	11574

MASSACHUSETTS

Boston	1891-Pro.	Spotiswoode	Boston	R. 5251a, 5252a	10646
	1895-Pro.	Wasserman	Boston	10663, 6	10665
	1898-Pro.	Shannon	Boston	10622-3	10622-3
	1902-Pro.	Garrity	Boston	10653, 5-6, 9	10655
Dorchester	1898-1920	Talbot	Boston	10628-31	10628-9
East Pembroke	1896-1899	Flynn	Buffalo	11137-8, 47	11144-5
Lenox	1902	White	Pittsfield	13645, 51	13644, 8-9
Lowell	1897 or 1898, 1900	Clancy	Buffalo	11154, 61	11160
Milton	1898-Pro.	Talbot	Boston	10628-31	10628-9
North Adams	1898-Pro.	Casey	North Adams	13689, 90, 4-5	
Pittsfield	1891-Pro.	O'Brien	Pittsfield	13632-5, 40	
	1898-Pro.	Cone	Pittsfield	13664-9, 76	13672, 4-5
	1902-Pro.	White	Pittsfield	13643, 51	13644, 8-9
Springfield	1896	Harley	Philadelphia	R. 5178a	11574

Localities	Dates	Witnesses	Town Deposition taken	"Budweiser" and "Bud" Identified Only Anheuser-Busch	Familiar with "Budweiser" advertising
			NEW JERSEY		
Atlantic City	1899	McDonald	Scranton	11787	11782, 3
	1900-1902	Nigro	Philadelphia	11512, 25	11520
South River	1900-1901	Flynn	Buffalo	11137-8, 47	11144-5
			NEW YORK		
Binghamton	Between 1880-1885	Hufnagel	Scranton	R. 5204a, 5208a	11778
	Prior to 1900-1904	Bidwell	Binghamton	10963, 7, 73	10967, 72
	Prior to 1900-Pro.	Marinan	Binghamton	11019, 20, 4-6	
	1900-Pro.	Wiley	Binghamton	10986, 94	10989-91
Brooklyn	1885-1886	Weiss	Hartford	13615-7, 29	
	1897	Harley	Philadelphia	R. 5179a	11574
Buffalo	1889-1891	Tucker	Buffalo	11114-5, 22-3	11122
	Some time between 1890-1900	Galivan	Jamestown	11285, 7	11283-4

Buffalo (Continued)	1890-Pro.	Bernhardt	Buffalo	R. 5235a	11037, 9-42
	1892-1915	Tucker	Buffalo	11116, 8, 22-3	11122
	1896	Harley	Philadelphia	R. 5179a	11574
	1898-Pro.	Dorfer	Buffalo	11074, 6, 81	11076-7, 9, 80
	1900-1910	Clancy	Buffalo	11154, 6, 61	11160
	1901	Kunz	Erie	11302, 7	
	1901	Sweeny	Erie	11349, 50	
	1901	Weiss	Hartford	13620, 9	
	1901	Smith, F. W.	Rochester	10927, 36	10935-6
	1901	Hufnagel	Scranton	R. 5205a, 5208a	11778
	1901	Aspenleiter	Rochester	R. 5249a, 5250a	
	1901	Wiley	Binghamton	10987, 94	10989-91
	1901-Pro.	Flynn	Buffalo	11139, 40, 7	11144-5
	1901-Pro.	Heusner	Buffalo	11057-9, 63	11060, 71-2
	1901-Pro.	Flynn	Buffalo	11139, 40, 7	11144-5
Celeron	1899, 1900	McCallum	Jamestown	11187, 94	
Danville	1888-1895	Wiley	Binghamton	10985, 94	10989-91
Dunkirk	Some time between 1890-1900	Galivan	Jamestown	11285, 7	11283-4
	1898 or 1899-1903 or 1904	Levandoski	Jamestown	11202-4, 10	
Greenhurst	1895-1899	Sherry	Erie	11329, 42-3	
	1897 or 1898	McCallum	Jamestown	11187, 94	

Localities	Dates	Witnesses	Town Deposition taken	"Budweiser" and "Bud" Identified Only Anheuser-Busch	Familiar with "Budweiser" advertising
		NEW YORK (Continued)			
Jamestown	1890-Pro.	Galivan	Jamestown	11279-81, 5	11283-6
	About 1892 or 1893-1898	Sherry	Erie	11329, 42	11341
	1894	McCallum	Jamestown	11186-9, 94	
	Late 1890s-Pro.	Bauer	Jamestown	11168-9, 77	11172, 3
	1899-Pro.	Stumpf	Jamestown	11267, 73-4	11267-8, 73
	About 1904-Pro.	McCallum	Jamestown	11187-9, 94	
	1905-Pro.	Levandoski	Jamestown	11205-7, 10	11210, 1
New York City	1881-Pro.	Tschirky	New York	R. 5245a, 5247a	
	1884	Weiss	Hartford	13616-9, 29	
	1893, 1894				
	Before 1885	Hufnagel	Scranton	R. 5202a, 5208a	R. 5202a, 5205a
	1896-1901	Weiss	Hartford	13618, 9, 29	
	1897	McDonald	Scranton	11787	11782-3
	1897	Harley	Philadelphia	R. 5179a	11574

New York City (Continued)	1898	Clancy	Buffalo	11153-4, 61	11160
	1899-Pro.	Kaffenberg	New York	12514, 7-8, 21	12518
	Prior to 1900	Perrine	New Haven	13468, 78	13468, 9
	1900	Phillips	Reading	11661, 75	11670-1
	1901 or 1902-1907	Holly	New Haven	13489, 93, 8	
	1903	Voight	Philadelphia	11537, 51	11545
	1904-1907	Voight	Philadelphia	11539, 51	11545
	1904-Pro.	Moynahan	New York	12489-91	
	1904-Pro.	Lorang	New York	12501-4	
	Before 1905	Price	Columbus	11448	11445
	1905-1913	Bidwell	Binghamton	10967-9, 73	10972
Niagara Falls	1900-1901	Stone	Buffalo	11095, 102	11102
	1904	Stone	Buffalo	11096, 102	11102
Rochester	1895-Pro.	Aspenleiter	Rochester	R. 5248a	R. 5248a, 5251a
	1896	Harley	Philadelphia	R. 5178a	11574
	1902 or 1903-1904	Smith, F. W.	Rochester	10927, 36	10935, 6
Salamanca	Some time between 1890-1900	Galivan	Jamestown	11285-7	11283-4
Syracuse	1896	Harley	Philadelphia	R. 5178a	11574

Localities	Dates	Witnesses	Town Deposition taken	"Budweiser" and "Bud" Identified Only Anheuser-Busch	Familiar with "Budweiser" advertising
			OHIO		
Cincinnati	1897	Harley	Philadelphia	R. 5179a, 5182a	11574
	1900, 1901	Harley	Philadelphia	R. 5182a, 5186a	11574
	Before 1905	Price	Columbus	11448	11445
Cleveland	1892 or 1893	Caven	Columbus	R. 5227a, 5233a	R. 5230a
	1897	Harley	Philadelphia	11571, 87	11574
	1903	Voight	Philadelphia	R. 5179a, 11538, 51 5186a	11545
	Before 1905	Price	Columbus	11448	11445
Columbus	1893-1916	Caven	Columbus	R. 5227a, 5231a	R. 5229a
	1885-Pro.	Lucks	Columbus	11436, 41	11435-6
	1896-Pro.	Hayes	Columbus	11428, 32-3	11429, 31-2
Logan	1884-1911	Price	Columbus	11444, 46-8	11445, 7
Youngstown	1902-1903	McCallum	Jamestown	11187, 94	
			PENNSYLVANIA		
Altoona	1893-Pro.	Kabella	Altoona	13262-3, 6, 8	13267
Bradford	Some time between late 1890s-1901	Bauer	Jamestown	11168-9,77	11172
	1891	Tucker	Buffalo	11114, 22-3	11122

Carbondale	1902	Ulrich	Scranton	11696, 706	11697-8
Chester	1889-1890	Craig	Philadelphia	R. 5187a, 5188a, 5193a	R. 5191a
Columbia	1893-1912	Gladfelter	Harrisburg	11889, 92, 900-1	11896, 8, 9
Corry	Some time between 1890-1900	Galivan	Jamestown	11285, 7	11283-4
	Some time between late 1890s-1901	Bauer	Jamestown	11168-9, 77	11172
	1897-1912	Sweeny	Erie	11345, 50	11359
	Before 1905	Kunz	Erie	11299-300, 7	11302-4
Dickson City	1885-1897	Hufnagel	Scranton	R. 5203a, 5208a	R.5205a, 5206a
Duncannon	1892-1908	Johnston	Harrisburg	11873-4, 82	11878-82
	1897-1898	Smith, J. W.	Harrisburg	11845-9, 55	11848-50
Erie	1886-1892 or 1893	Sherry	Erie	11327, 9, 42	11341
	Some time between 1890-1900	Galivan	Jamestown	11285, 7	11283-4
	1891 or 1892	Rice	Erie	11418, 23	11421
	1892-Pro.	Fieger	Erie	R. 5169a, 5172a, 5173a	11392-3
	1893 or 1894-Pro.	Carrig	Erie	11361, 4, 8	11366-7

Localities	Dates	Witnesses	Town Deposition taken	"Budweiser" and "Bud" Identified Only Anheuser-Busch	Familiar with "Budweiser" advertising
		PENNSYLVANIA (Continued)			
Erie (Continued)	1895 or 1896-Pro.	Hatie	Erie	11378-80	11380
	1899-Pro.	Kunz	Erie	11295-8, 307	11302-4
	About 1900-Pro.	Sherry	Erie	11331, 42	11336-8, 41
Greenville	Some time between late 1890s-1901	Bauer	Jamestown	11168-9, 77	11172
	Before 1905	Kunz	Erie	11299, 300, 7	11302-4
Harrisburg	About 1900-Pro.	Smith, J. W.	Harrisburg	R. 5198a-5201a	R. 5200a-5201a
	1904-about Pro.	Acri	Harrisburg	R. 5194a-5195a, 5198a	11863, 5
	Before 1905	Johnston	Harrisburg	11880, 2	11878-82
Honesdale	1902	Ulrich	Scranton	11696, 706	11697-8
Kane	About 1900	Sherry	Erie	11330, 42	11341
	Before 1905	Kunz	Erie	11299, 300, 7	11302-4

Lackawanna County	1897-Pro.	Hufnagel	Scranton	R. 5203a, 5208a	R. 5205a, 5206a
Lancaster	About 1891	Gladfelter	Harrisburg	11889, 900-1	11896, 8-9
Luzerne County	1897-Pro.	Hufnagel	Scranton	R. 5203a, 5208a	R. 5206a
Mahanoy City	1901-1902	Lyons	Philadelphia	11590, 8	11594
Mauch Chunk	Before 1900	Hoehing	Scranton	11719, 20	11723
Meadville	Some time between late 1890s-1901	Bauer	Jamestown	11168-9, 77	11172
Mt. Carmel	1903-1904	Lyons	Philadelphia	11591, 8	11594
Philadelphia	1892-1912	Craig	Philadelphia	R. 5188a, 5189a, 5193a	R. 5191a
	1894-Pro.	Boteler	Philadelphia	11487, 9, 97	11491, 3
	1896-Pro.	Harley	Philadelphia	R. 5178a, 5179a, 5183a, 5184a, 5186a	11574, 84-5
	Before 1900-Pro.	Kopp	Philadelphia	11609-10, 19	11611, 7-8
	1902-Pro.	Nigro	Philadelphia	11513, 25	11520, 3-4
Pittsburgh	1887	Caven	Columbus	R. 5226a, 5233a	R. 5230a
	1897	Harley	Philadelphia	R. 5179a, 5186a	11574
	1901 or 1902	Boteler	Philadelphia	11493, 7	11491, 3
	1902-1903	Voight	Philadelphia	11536, 51	11545

Localities	Dates	Witnesses	Town Deposition taken	"Budweiser" and "Bud" Identified Only Anheuser-Busch	Familiar with "Budweiser" advertising
		PENNSYLVANIA (Continued)			
Reading	1895-1917	Heiter	Reading	11634-8, 44	11642, 5-7
	1902 or 1903-1910	Phillips	Reading	11663, 5-7, 75	11670-1
Scranton	1895-Pro.	McDonald	Scranton	11779, 87	11782-3
	1898-Pro.	Zenke	Scranton	11734-5, 7-40	11738
	1900-1917	Hoehing	Scranton	11720-1	11723
	1902-Pro.	Ulrich	Scranton	11693-4, 706	11697-702
Starucca	1900-1913	Woodmansee	Binghamton	11006-7, 11	
Steelton	1897-1898	Smith, J. W.	Harrisburg	11849, 55	R. 5200-5201a
Stroudsburg	1902	Ulrich	Scranton	11696, 706	11697-8
Union City	1893 or 1894	Rice	Erie	11418, 23	11421
	1903-Pro.	Rice	Erie	11420, 23	11421
Warren	Some time between late 1890s-1901	Bauer	Jamestown	11168-9, 77	11172
	About 1898-about 1901	Sherry	Erie	11330, 42	11341

	Before 1900-Pro.	Jury	Jamestown	11244, 8-9	11246-7
	1903-Pro.	McCabe	Jamestown	R. 5173a, 5175a	R. 5175a
	Before 1905	Kunz	Erie	11299, 300, 7	11302-4
Wilkes-Barre	Between 1880-1885	Hufnagel	Scranton	R. 5204a, 5208a	R. 5206a
	1902	Ulrich	Scranton	11696, 706	11697-8
Williamsport	About 1901-1903	Habbel	Williamsport	11812, 8	11816
	1901-Pro.	Rohrer	Williamsport	R. 5064a	
York	1886-about 1911	Welsh	Harrisburg	11824-5, 34	11829-30

RHODE ISLAND

Narragansett Pier	1901	Ray	Providence	R. 5261a, 5265a	R. 5263a, 5265a, 5266a
Pawtucket	Prior to 1901	Ray	Providence	R. 5261a, 5265a	R. 5263a, 5265a, 5266a
Providence	1893-Pro.	Volpe	Providence	13356, 8, 65	13360
	1900-Pro.	Timmons	Providence	13343, 9	13349
	After 1901-Pro.	Ray	Providence	13332, 9	13349
	1902-Pro.	Bagley	Providence	13319, 20-4	